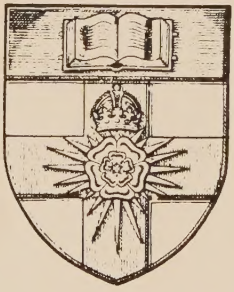
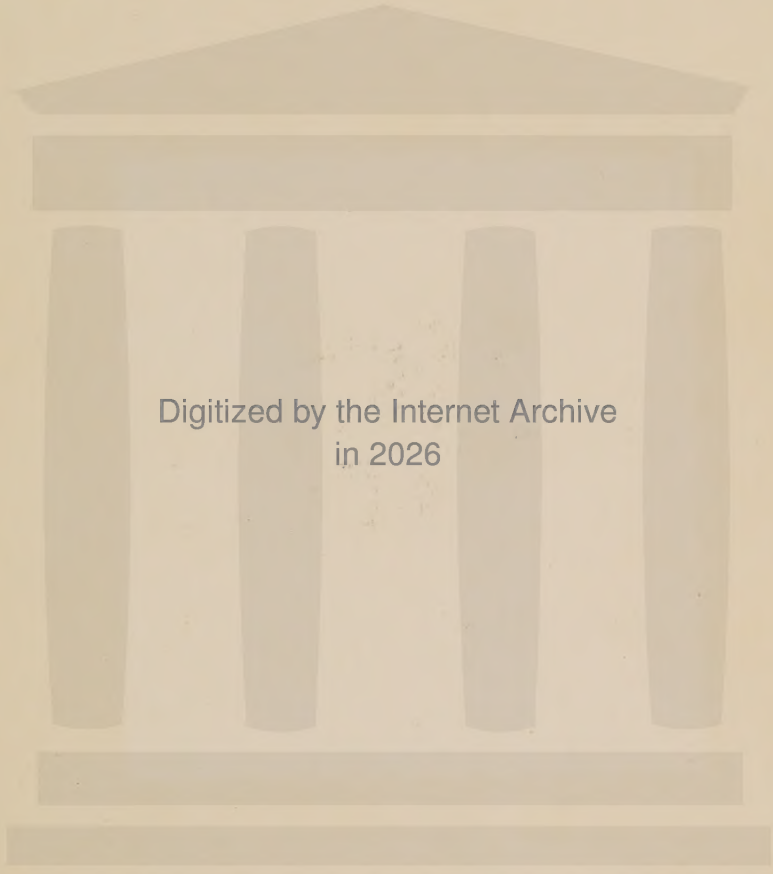
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

346.4
Mx. North



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1907_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. Warmington, Esq., K.C.
Vice-Chairman—Sir F. A. Bosanquet, K.C.

EX-OFFICIO MEMBERS.

Sir John Lawson Walton, M.P. . . Attorney-General.
Sir William S. Robson, M.P. . . Solicitor-General.
Henry Attlee, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. J. Eldon Bankes, Esq., K.C.	Inner Temple.
C. M. Warmington, Esq., K.C. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams, Knt. (Firm—Messrs. Hollams, Sons, Coward & Hawksley). E. J. Bristow, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1907.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	EDMUND LUMLEY, ALEX. MORTIMER, W. J. BROOKS,	*Barristers-at-Law.*
King's Bench, Crown Cases Reserved; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases	J. F. CLERK, A. P. P. KEEP, F. O. ROBINSON, J. E. ALDOUS, W. H. GRIFFITH,	*Barristers-at-Law.*
Bankruptcy Cases	H. L. FRASER,	*Barrister-at-Law.*

1907.—VOL. I.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1907.

Lord Loreburn, Lord Chancellor.

Lord Alverstone, Lord Chief Justice of England.

Sir Richard Henn Collins, Sir H. H. Cozens-Hardy,	Masters of the Rolls.
Sir John Gorell Barnes,	President of the Probate, Divorce, and Admiralty Division.
Sir Roland Vaughan Williams, Sir H. H. Cozens-Hardy, Sir J. Fletcher Moulton, Sir George Farwell, Sir H. B. Buckley, Sir W. R. Kennedy,	Lords Justices of the Court of Appeal.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1907.

The Right Hon. Lord Alverstone, Lord Chief Justice of England, President.

The Hon. Sir William Grantham, Knt.

The Hon. Sir John Compton Lawrance, Knt.

The Hon. Sir William Rann Kennedy, Knt.

The Hon. Sir Edward Ridley, Knt.

The Hon. Sir John Charles Bigham, Knt.

The Hon. Sir Charles John Darling, Knt.

The Hon. Sir Arthur Moseley Channell, Knt.

The Hon. Sir Walter George Frank Phillimore, Bart.

The Hon. Sir Thomas Townsend Bucknill, Knt.

The Hon. Sir Joseph Walton, Knt.

The Hon. Sir Arthur Richard Jelf, Knt.

The Hon. Sir Reginald More Bray, Knt.

The Hon. Sir Alfred Tristram Lawrence, Knt.

The Hon. Sir Henry Sutton, Knt.

The Hon. Sir William Pickford, Knt.

ATTORNEY-GENERAL :

Sir John Lawson Walton, Knt.

SOLICITOR-GENERAL :

Sir William S. Robson, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
155	1 and throughout case.	In re Van Laun. Ex parte Pattullo.	In re Van Laun. Ex parte Chatterton.

BIBL.
LONDIN.
UNIV.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1907, will be as follows:—

In the First Series,
[1907] 1 Ch. [1907] 2 Ch.

In the Second Series,
[1907] 1 K. B. [1907] 2 K. B. [1907] P.

In the Third Series,
[1907] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Alexandra (Newport and South Wales) Docks and Railway Company *v.* Taff Vale Railway Company (C. A.)	356
Arthur, Henderson *v.* (C. A.)	10
Associated Omnibus Company, Smith *v.*	916
Attenborough & Son, Oppenheimer *v.*	510
Attorney-General *v.* Glossop (C. A.)	163
Audley, Rex *v.* (C. C. R.)	383

B.

Bagnall *v.* Levinstein, Ld. (C. A.)	531
Banbury Union, Great Central Railway Company *v.* (C. A.)	717
Bank of England *v.* Cutler	889
Bankruptcy Notice, In re A (C. A.)	478
Bastable *v.* Little	59
Bede Steamship Company *v.* River Wear Commissioners (C. A.)	310
Benjamin, Martin *v.*	64
Bennett, In re. Ex parte Official Receiver	149
Bensted, Ystradyfodwg and Pontypridd Main Sewerage Board *v.* (C. A.)	490
Biddle *v.* Hart (C. A.)	649
Biggar, Robson *v.*	690
Birch & Co., Ld., Edmondson *v.* (C. A.)	371
Birkenhead Corporation, Fletcher *v.* (C. A.)	205
Blackpool and Fleetwood Tramroad Company *v.* Thornton Urban Council (C. A.)	568
Blakiston, Cooper *v.*	336
Branckelow Steamship Company *v.* Lamport & Holt	787, n.
Bristol Union, Wantage Union *v.*	68
Brixton Prison (Governor of), Rex *v.* Ex parte Percival	696
Bullock *v.* London General Omnibus Company (C. A.)	264
Burr *v.* Theatre Royal, Drury Lane, Ld. (C. A.)	544
Button, In re. Ex parte Haviside	397

C.

PAGE

Caine *v.* Palace Steam Shipping Company (C. A.) 670
Cairn Line of Steamships, Ld. *v.* Trinity House Corporation 604
Cannings, Ld. and Middlesex County Council, In re (C. A.) 51
Carter, Rex *v.* 298
Channel Coaling Company *v.* Ross 145
Chatterton, Ex parte. In re Van Laun 155
Coles and Ravenshear, In re (C. A.) 1
Colwyn Bay and Colwyn District Council, Horton *v.* 14
Cooke, Lloyd's Bank, Ld. *v.* (C. A.) 794
Cooper *v.* Blakiston 336
Critchell *v.* London and South Western Railway Company (C. A.) 860
Cutler, Bank of England *v.* 889

D.

Daily Record (Glasgow), Ld., Watson & Sons *v.* (C. A.) 853
Darling *v.* Raeburn (C. A.) 846
Darlington *v.* Roscoe & Sons (C. A.) 219
Davies *v.* Seisdon Union (C. A.) 630
Dawes *v.* Wilkinson 278
De la Bere *v.* Pearson, Ld. 483
De Marny, Rex *v.* (C. C. R.) 388
Denton, Scott *v.* 456
Dewar *v.* Goodman 612
Digby *v.* Financial News, Ld. (C. A.) 502
Dorchester Corporation, Tory *v.* 393
Douglas *v.* Smith 126
Du Cros *v.* Lambourne 40

E.

Edmondson *v.* Birch & Co., Ld. (C. A.) 371

PAGE

Elswick Steamship Company *v.* Montaldi 626
Emanuel *v.* Symon 235
Empress Assurance Corporation, United States Shipping Company *v.* 259
English *v.* Metropolitan Water Board 588
Eyre, In re 331

F.

Financial News, Ld., Digby *v.* (C. A.) 502
Fletcher *v.* Birkenhead Corporation (C. A.) 205
Frazer & Wyatt, Oppenheimer *v.* 519

G.

Garrett, Rex *v.* (C. A.) 881
General Council of the Bar (England) *v.* Inland Revenue Commissioners 462
George Clarke, Ld., Handford *v.* (C. A.) 181
Gillard, Hancock & Co. *v.* 47
Glossop, Attorney-General *v.* (C. A.) 163
Goldsmiths' Company *v.* Wyatt (C. A.) 95
Goodman, Dewar *v.* 612
Gordon Hotels, Ld., Westminster Corporation *v.* (C. A.) 910
Great Central Railway Company *v.* Banbury Union (C. A.) 717

H.

Hall, In re. Ex parte Official Receiver (C. A.) 875
Hancock & Co. *v.* Gillard 47
Handford *v.* George Clarke, Ld. (C. A.) 181
Hart, Biddle *v.* (C. A.) 649
Haviside, Ex parte. In re Button 397
Henderson *v.* Arthur (C. A.) 10

PAGE

Horton *v.* Colwyn Bay and Colwyn District Council 14
——— *v.* Penn 561
Hoyes *v.* Tate (C. A.) 656
Hutton *v.* Ras Steam Shipping Company (C. A.) 834

I.

Inland Revenue Commissioners, General Council of the Bar (England) *v.* 462
———,
Rex *v.* Ex parte Silvester 108
———,
Speyer Brothers *v.* (C. A.) 246

J.

James Joicey & Co., Ld. *v.* North Eastern Railway Company (C. A.) 402
James Nelson & Sons, Ld. *v.* Nelson Line (Liverpool), Ld. (No. 2) (C. A.) 769
———
v. Nelson Line (Liverpool), Ld. 788, n.
Joseph, Wood Green Urban Council *v.* (C. A.) 182
Joseph Thorley, Ld. *v.* Orchis Steamship Company, Ld. 243
——— *v.* ———
——— (C. A.) 660

K.

Kingston-on-Thames, Surbiton, New Malden and Coombe Joint Burials Committee, Young *v.* (C. A.) 416
Kruger & Co., Moel Tryvan Ship Company *v.* (C. A.) 809

L.

Lambourne, Du Cros *v.* 40
Lamport & Holt, Branckelow Steamship Company *v.* 787, n.
Larcombe *v.* Simey 139

PAGE

Leonis Steamship Company, Ld. *v.* Rank, Ld. 344
Levinstein, Ld., Bagnall *v.* (C. A.) 531
Little, Bastable *v.* 59
Lloyd's Bank, Ld. *v.* Cooke (C. A.) 794
Lodge Holes Colliery Company, Ld., Wednesbury Corporation *v.* (C. A.) 78
London and South Western Railway Company, Critchell *v.* (C. A.) 860
London General Omnibus Company, Bullock *v.* (C. A.) 264

M.

Maritime Insurance Company, Swan & Cleland's Graving Dock and Slipway Company *v.* 116
Martin *v.* Benjamin 64
Maxwell *v.* Wolseley (Viscount) (C. A.) 274
Melladew, Rex *v.* (C. A.) 192
Metropolitan Water Board, English *v.* 588
———
v. Paine 285
Middlesex County Council and Cannings, Ld., In re (C. A.) 51
Moel Tryvan Ship Company *v.* Kruger & Co. (C. A.) 809
Montaldi, Elswick Steamship Company *v.* 626
Moulis *v.* Owen (C. A.) 746

N.

National Telephone Company, Sewell *v.* (C. A.) 557
Nelson Line (Liverpool), Ld., James Nelson & Sons, Ld. *v.* (No. 2) (C. A.) 769
———,
James Nelson & Sons, Ld. *v.* 788, n.

PAGE

North Eastern Railway Company, James Joicey & Co., Ld. *v.* (C. A.) 402
North Manchester Overseers *v.* Winstanley 27

O.

Official Receiver, Ex parte. In re Bennett 149
In re Hall (C. A.) 875
In re Tyler (C. A.) 865
In re Webster 623
Oppenheimer *v.* Attenborough & Son 510
——— *v.* Frazer & Wyatt 519
Orchis Steamship Company, Ld., Joseph Thorley, Ld. *v.* 243
———, ——— *v.* (C. A.) 660
Owen, Moulis *v.* (C. A.) 746

P.

Paine, Metropolitan Water Board *v.* 285
Palace Steam Shipping Company, Caine *v.* (C. A.) 670
Pearson, Ld., De la Bere *v.* 483
Penn, Horton *v.* 561
Percival, Ex parte. Rex *v.* Governor of Brixton Prison 696
Powell *v.* Vickers, Sons & Maxim, Ld. (C. A.) 71

R.

Raeburn, Darling *v.* (C. A.) 846
Rahtken's Shipping Company, Whittell & Co. *v.* 783
Rank, Ld., Leonis Steamship Company, Ld. *v.* 344
Ras Steam Shipping Company, Hutton *v.* (C. A.) 834

PAGE

Ravenshear and Coles, In re (C. A.) 1
Rex *v.* Audley (C. C. R.) 383
—— *v.* Brixton Prison (Governor of). Ex parte Percival 696
—— *v.* Carter 298
—— *v.* De Marny (C. C. R.) 388
—— *v.* Garrett (C. A.) 881
—— *v.* Inland Revenue Commissioners. Ex parte Silvester 108
—— *v.* Melladew (C. A.) 192
Rhondda Urban Council *v.* Taff Vale Railway Company 739
River Wear Commissioners, Bede Steamship Company *v.* (C. A.) 310
Robinson Brothers, West Riding of Yorkshire Rivers Board *v.* (C. A.) 431
Robson *v.* Biggar 690
———, Yuill & Co. *v.* 685
Roscoe & Sons, Darlington *v.* (C. A.) 219
Ross, Channel Coaling Company *v.* 145

S.

Samuel Brothers, Ld. *v.* Whetherly 709
Scott *v.* Denton 456
—— Robson, Yuill & Co. *v.* 685
Seisdon Union, Davies *v.* (C. A.) 630
Sewell *v.* National Telephone Company (C. A.) 557
Sharp, West Ham Corporation *v.* 445
Silvester, Ex parte. Rex *v.* Inland Revenue Commissioners 108
Simey, Larcombe *v.* 139
Smith *v.* Associated Omnibus Company 916
———, Douglas *v.* 126
South Wales Miners' Federation, Steele *v.* 316

PAGE

Speyer Brothers *v.* Inland Revenue Commisioners (C. A.) 246
Steele *v.* South Wales Miners' Federation 361
Swan & Cleland's Graving Dock and Slipway Company *v.* Maritime Insurance Company 116
Symon, Emanuel *v.* 235

T.

Taff Vale Railway Company, Alexandra (Newport and South Wales) Docks and Railway Company *v.* (C. A.) 356

Rhondda Urban Council *v.* 739
Tate, Hoyes *v.* (C. A.) 656
Theatre Royal, Drury Lane, Ld., Burr *v.* (C. A.) 544
Thornton Urban Council, Blackpool and Fleetwood Tramroad Company *v.* (C. A.) 568
Tory *v.* Dorchester Corporation 393
Tozeland *v.* West Ham Union (C. A.) 920
Trinity House Corporation, Cairn Line of Steamships, Ld. *v.* 604
Tyler, In re. Ex parte Official Receiver (C. A.) 865

U.

United States Shipping Company *v.* Empress Assurance Corporation 259

V.

Van Laun, In re. Ex parte Chatterton 155
Vickers, Sons & Maxim, Ld., Powell *v.* (C. A.) 71

W.

PAGE

Wantage Union *v.* Bristol Union 68
Watson & Sons *v.* Daily Record (Glasgow), Ld. (C. A.) 853
Webster, In re. Ex parte Official Receiver 623
Wednesbury Corporation *v.* Lodge Holes Colliery Co., Ld. (C. A.) 78
West Ham Corporation *v.* Sharp 445
West Ham Union, Tozeland *v.* (C. A.) 920
West Riding of Yorkshire Rivers Board *v.* Robinson Brothers (C. A.) 431
Westminster Corporation *v.* Gordon Hotels, Ld. (C. A.) 910
Whetherly, Samuel Brothers, Ld. *v.* 709
Whittall & Co. *v.* Rahtken's Shipping Company 783
Wilkinson, Dawes *v.* 278
Willis *v.* Young 448
Winstanley, North Manchester Overseers *v.* 27
Wolseley (Viscount), Maxwell *v.* (C. A.) 274
Wood Green Urban Council *v.* Joseph (C. A.) 182
Wyatt, Goldsmiths' Company *v.* (C. A.) 95

Y.

Young *v.* Kingston-on-Thames, Surbiton, New Malden and Coombe Joint Burials Committee (C. A.) 416
———, Willis *v.* 448
Ystradyfodwg and Pontypridd Main Sewerage Board *v.* Bensted (C. A.) 490
Yuill & Co. *v.* Scott Robson 685

TABLE OF CASES CITED.

A.

		PAGE
Alderson *v.* Palliser	[1901] 2 K. B. 833	147
Alianza Company *v.* Bell	[1905] 1 K. B. 184; [1906] A. C. 434	493
Allan *v.* Liverpool Overseers	L. R. 9 Q. B. 180	198
Allen *v.* New Gas Company	1 Ex. D. 251	550
Allport *v.* Nutt	1 C. B. 974	452
Applegarth *v.* Colley	10 M. & W. 723	749
Arton, In re	[1896] 1 Q. B. 509	705
Ashcroft *v.* Crow Orchard Colliery	L. R. 9 Q. B. 540	350
Atherton *v.* Cheshire County Council	60 J. P. 6	84
Attorney-General *v.* Beech	[1899] A. C. 53	170
——— *v.* Carlton Bank	[1899] 2 Q. B. 158	466
——— *v.* Conduit Colliery Company	[1895] 1 Q. B. 301	80
——— *v.* Logan	[1891] 2 Q. B. 100	90
——— *v.* Penrhyn	83 L. T. 103	166
——— *v.* Sefton (Earl)	H. & C. 362; 11 H. L. C. 257	494
——— *v.* Staffordshire County Council	[1905] 1 Ch. 336	85
——— *v.* Wood	[1897] 2 Q. B. 102	164
Austin *v.* Dowling	L. R. 5 C. P. 534	558
Austin Friars Steam Shipping Company *v.* Strack	[1905] 2 K. B. 315	672
Awde *v.* Dixon	6 Ex. 869	798

B.

Babcock *v.* Lawson	4 Q. B. D. 394	797
Bahia and San Francisco Railway Company, In re	L. R. 3 Q. B. 584	900
Baines *v.* Swainson	4 B. & S. 270	521
Balian *v.* Joly, Victoria & Co.	6 Times L. R. 345	243, 660
Ball, In re	[1899] 2 I. R. 313	149
Ballard *v.* Tomlinson	29 Ch. D. 115	602
Bally *v.* Wells	3 Wils. 25	619
Banister, In re	12 Ch. D. 131	872
Bank of Australasia *v.* Harding	9 C. B. 661	238
Bank of England *v.* Vagliano Brothers	[1891] A. C. 108	798
Barclay *v.* Pearson	9 Times L. R. 269	452
Barnsley Canal Company *v.* Twibell	13 L. J. (Ch.) 434	405
Barton *v.* North Staffordshire Railway Company	38 Ch. D. 458	901

		PAGE
Barton *v.* Williams	5 B. & Al. 395	522
Bartonshill Coal Company *v.* Reid	3 Macq. 266	548
Bateman (Baroness) and Parker's Contract, In re	[1899] W. N. 30	33
Bater and Birkenhead Corporation, In re	[1893] 2 Q. B. 77	18
Baxendale *v.* Bennett	3 Q. B. D. 525	487, 802
Baxter *v.* Midland Railway Company	93 L. T. 538	54
Baylis, In re	[1896] 2 Ch. 107	160
Beacon Life and Fire Assurance Company *v.* Gibb	1 Moo. P. C. (N.S.) 73; 7 L. T. 574	291
Bearn, The	[1906] P. 48	327
Beavan, In re	23 L. J. (Ch.) 536	465
Becquet *v.* MacCarthy	2 B. & Ad. 951	240
Behn *v.* Burness	3 B. & S. 751	245, 662
Belshaw *v.* Bush	11 C. B. 191	13
Benford *v.* Sims	[1898] 2 Q. B. 641	40
Bennetts & Co. *v.* McIlwraith & Co.	[1896] 2 Q. B. 464	268
Beswick *v.* Alker	L. R. 8 C. P. 265; 42 L. J. (C.P.) 26	38
Bidder *v.* North Staffordshire Railway Company	4 Q. B. D. 412	406
Bilton's Case	1 O'M. & H. 171	141
Binstead, In re	[1893] 1 Q. B. 199	480
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	812
Birmingham Corporation *v.* Baker	17 Ch. D. 782	447
Blyth and Young, In re	13 Ch. D. 416	2
Bonnard *v.* Perryman	[1891] 2 Ch. 269	859
Bootle Overseers *v.* Liverpool Warehouse Company	85 L. T. 45	193
Bournemouth Commissioners *v.* Watts	14 Q. B. D. 87.	394
Bowker *v.* Evans	15 Q. B. D. 565	222
Boxsius *v.* Goblet Frères	[1894] 1 Q. B. 842	371
Boydell *v.* Jones	4 M. & W. 446.	505
Boyle, In re	5 D. M. & G. 540	155
——— *v.* Brandon	13 M. & W. 738	466
Bradford *v.* Eastbourne Corporation	[1896] 2 Q. B. 205	187, 494
——— *v.* Pickles	[1895] A. C. 587	602
Bradley *v.* Baylis	8 Q. B. D. 195.	137
Branckelow Steamship Company *v.* Lamport	[1907] 1 K. B. 787, n.	787
Brennan *v.* Limerick Guardians	2 L. R. Ir. 42	920
Brereton *v.* Chapman	7 Bing. 559	351
Brewster *v.* Kitchell	1 Salk. 198	619
Bristol Poor (Governors of) *v.* Wait	1 Ad. & E. 264	200
British India Steam Navigation Company *v.* Inland Revenue Commissioners	7 Q. B. D. 165.	248, 251
Broad *v.* Perkins	21 Q. B. D. 533	146
Brocklesby *v.* Temperance Permanent Building Society	[1895] A. C. 173	796
Brooks *v.* Baker	[1906] 1 K. B. 11	142
Brown *v.* Berkeley	1 Cowp. 281	766
——— *v.* Feeney	[1906] 1 K. B. 563	274
———, Shipley & Co. *v.* Inland Revenue Commissioners	[1895] 2 Q. B. 598	248
Bryson *v.* Wylie	1 Bos. & P. 83, n.	399

		PAGE
Buckton *v.* Higgs	4 Ex. D. 174	72
Bulling *v.* Frost	1 Esp. 235	763
Burgess *v.* Northwich Local Board	6 Q. B. D. 264	84
Burland's Trade Mark, In re	41 Ch. D. 542	857
Burton *v.* Pinkerton	L. R. 2 Ex. 340	672
Burton-on-Trent Corporation *v.* Burton-on-Trent Union	24 Q. B. D. 197	635
Bwllfa and Merthyr Dare Steam Collieries *v.* Pontypridd Waterworks Company	[1903] A. C. 426	404

C.

Cahn *v.* Pockett's Bristol Channel Steam Packet Company	[1899] 1 Q. B. 643	513, 521
Caine *v.* Palace Shipping Company	[1907] 1 K. B. 671	840
Caledonian Railway Company *v.* Ogilvy	2 Macq. 229	19
Campbell *v.* Lewis	3 B. & Al. 392	616
Cannan *v.* Bryce	3 B. & Al. 179	767
Carey *v.* Eccleston	Craw. & D. (N.C.) 6	466
Carisbrook, The	15 P. D. 98	350
Carlton Steamship Company *v.* Castle Mail Packets Company	2 Com. Cas. 173, 286	847
Carr *v.* London and North Western Railway Company	L. R. 10 C. P. 307	797, 897
Castrique *v.* Imrie	L. R. 4 H. L. 414	674
Caucasian Trading Corporation, Ex parte	[1896] 1 Q. B. 368	480
Chamberlain's Wharf *v.* Smith	[1900] 2 Ch. 605	365
Chapman, In re	20 Times L. R. 3	158
Charles *v.* Taylor	3 C. P. D. 492	548
Chasemore *v.* Richards	7 H. L. C. 349	591
Chatenay *v.* Brazilian Submarine Telegraph Co.	[1891] 1 Q. B. 79	747
Chavasse, Ex parte	4 D. J. & S. 655	672
Chinery, Ex parte	12 Q. B. D. 342	480
City of Glasgow Union Railway Company *v.* Hunter	L. R. 2 H. L. Sc. 78	19
Clayton *v.* Jennings	2 W. Bl. 706	763
Clegg *v.* Hands	44 Ch. D. 503	617
Clyde Navigation Trustees *v.* Laird	8 App. Cas. 658	107
Cochrane, In re	[1905] 2 I. R. 626; [1906] 2 I. R. 200	167
Coe *v.* Wise	5 B. & S. 440	928
Coggs *v.* Bernard	2 Ld. Raym. 909; 1 Sm. L. C. 11th ed. p. 173	467
Cohen *v.* Mitchell	25 Q. B. D. 262	149
Cole *v.* North Western Bank	L. R. 10 C. P. 354	513, 521
Collen *v.* Wright	8 E. & B. 647	904
Collier *v.* Valentine	11 Mo. 299	662
Collins *v.* Paddington Vestry	5 Q. B. D. 368	3
Congleton Corporation *v.* Pattison	10 East, 130	619
Cook *v.* North Metropolitan Tramways Company	18 Q. B. D. 683	536, 916
Cooke, Sons & Co. *v.* New River Co.	14 App. Cas. 698	289
Copin *v.* Adamson	L. R. 9 Ex. 345; 1 Ex. D. 17	235
Coster *v.* Headland	[1906] A. C. 286	457
Coverdale *v.* Charlton	2 Q. B. D. 104	80

		PAGE
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A. C. 198	170
Cowper-Essex *v.* Acton Local Board	14 App. Cas. 153	18
Cropper *v.* Smith	26 Ch. D. 700	3
Cross *v.* Williams	7 H. & N. 675	712
Cubison *v.* Mayo	[1896] 1 Q. B. 246	394
Cusack *v.* London and North Western Railway Company	[1891] 1 Q. B. 347	2

D.

Dahl *v.* Nelson, Donkin & Co.	6 App. Cas. 38	348
Dall'Orso *v.* Mason & Co.	3 R. 419	350
Danvers *v.* Thistlethwaite	1 Lev. 244	763
Davies *v.* McVeagh	4 Ex. D. 265	350
——— *v.* Seisdon Union	[1907] 1 K. B. 630	733
Davis *v.* Bank of England	2 Bing. 393; 5 B. & C. 185	896
—— *v.* Garrett	6 Bing. 716	244, 662
—— *v.* Gyde	2 A. & E. 623	13
Day *v.* Glaister	2 F. 963	465
De Bernales *v.* New York Herald	[1893] 2 Q. B. 97, n.	856
De Bode's (Baron) Case	8 Q. B. 208	703
De Hoghton, In re	[1896] 1 Ch. 855	170
Derry *v.* Peek	14 App. Cas. 337	895
Devereux *v.* Clarke & Co.	[1891] 2 Q. B. 582	505
Dickinson *v.* Grand Junction Canal Company	7 Ex. 282	593
Dillon *v.* Haverfordwest Corporation	[1891] 1 Q. B. 575	494
Doughty *v.* Bowman	11 Q. B. 444	616
Dublin Corporation *v.* M'Adam	20 L. R. Ir. 497	494
Dugdale *v.* Lovering	L. R. 10 C. P. 196	812
Dunbar *v.* Ardee Guardians	[1897] 2 I. R. 76	920
Dunbeth, The	[1897] P. 133	245, 663
Duncan, In re	[1899] 1 Ch. 387	222

E.

Edmonds *v.* Blaina Furnaces Company	36 Ch. D. 215	248
Edmunds *v.* Wallingford	14 Q. B. D. 811	398
Ellen *v.* Topp	6 Ex. 424	662, 828
Else *v.* Else	L. R. 13 Eq. 196	868
Emsley *v.* North Eastern Railway Company	[1896] 1 Ch. 418	207
English and American Machinery Company *v.* Campbell Machine Company	39 Sol. J. 449	856
Engman *v.* Palgrave, Brown & Son	4 Com. Cas 75	245
Esdaile *v.* Payne	40 Ch. D. 520	3

F.

Farquharson *v.* Morgan	[1894] 1 Q. B. 552	147
——— Brothers *v.* King & Co.	[1901] 2 K. B. 697; [1902] A. C. 325	797
Feather *v.* Reg.	6 B. & S. 257	107
Felix, The	L. R. 2 A. & E. 273	349
Fenwick *v.* East London Railway Company	L. R. 20 Eq. 544	207

		PAGE
Ferrand *v.* Hallas Land and Building Company	[1893] 2 Q. B. 135	187
Finlay *v.* Chirney	20 Q. B. D. 494	222
Fleming *v.* Dollar	23 Q. B. D. 388	505
Foley *v.* Fletcher	3 H. & N. 769	494
Forbes *v.* Aspinall	13 East, 323	259
Ford, Ex parte	16 Q. B. D. 305	812
—— *v.* Barnes	16 Q. B. D. 254	141
—— *v.* Elmsley	16 Q. B. D. 254	141
France *v.* Clark	26 Ch. D. 257	798
Frankenburg *v.* Great Horseless Carriage Company	[1900] 1 Q. B. 504	266
Frape, In re	[1893] 2 Ch. 284	160
Fuentis *v.* Montis	L. R. 3 C. P. 268	524
Fusilier, The	34 L. J. (P. M. & A.) 25	583

G.

Gage *v.* Elsey	10 Q. B. D. 518	282
—— *v.* Wren	87 L. T. 271	198
Garrard *v.* Lewis	10 Q. B. D. 30	797
Garth *v.* Cotton	1 Dick. 183	179
George Home, The	1 Hagg. Adm. 370	682
Gibson *v.* McCarty	Cas. t. Hardw. 311	674
——— *v.* Young	21 N. S. Wales L. R. 7	922
Goldberg, Ex parte	[1893] 1 Q. B. 417	181
Good *v.* Elliott	3 T. R. 693	758
Goodwin *v.* Sheffield Corporation	[1902] 1 K. B. 629	912
Goutard *v.* Carr	13 Q. B. D. 598, n.	72
Gower *v.* Couldridge	[1898] 1 Q. B. 348	266
——— *v.* Postmaster-General	57 L. T. 527	618
Grand Junction Canal Co. *v.* Shugar	L. R. 6 Ch. 483; 19 W. R. 569; 24 L. T. 402	588, 595
Graves *v.* Legg	9 Ex. 709	662
Gray *v.* Bartholomew	[1895] 1 Q. B. 209	274
Great Eastern Railway Company *v.* Haughley	L. R. 1 Q. B. 666	717
Great Western Railway Company *v.* Ilminster	4 L. G. R. 99, n.	720
Greenslade *v.* Darby	L. R. 3 Q. B. 421	33
Gregory *v.* Tuffs	6 C. & P. 271	66
Gretton *v.* Mees	7 Ch. D. 839	72
Grey (Earl) *v.* Attorney-General	[1900] A. C. 124	168
Grinham *v.* Willey	4 H. & N. 496; 28 L. J. (Ex.) 242	558

H.

Hall, In re	[1907] 1 K. B. 875	868
—— *v.* McWilliam	65 J. P. 742	452
Hammersmith and City Railway Company *v.* Brand	L. R. 4 H. L. 171	205
Hansen *v.* Harrold Brothers	[1894] 1 Q. B. 612	813
Hardman *v.* Booth	1 H. & C. 803	513, 521
Hardwick *v.* Lane	[1904] 1 K. B. 204	66
Harris *v.* Dignum	29 L. J. (Ex.) 23	558
Hart *v.* Allen	2 Watts, 114	662
Harter *v.* Salford Overseers	6 B. & S. 591	198
Hastings *v.* Pearson	[1893] 1 Q. B. 62	512
Havelock *v.* Geddes	10 East, 555	662

		PAGE
Haylock *v.* Sparke	1 E. & B. 471	434
Heath *v.* Sansom	4 B. & Ad. 172	242
Hedley *v.* Pinkney & Sons Steamship Company	[1894] A. C. 222	549
Helen, The	L. R. 1 A. & E. 1	679
Helsby, In re	[1894] 1 Q. B. 742	1
Hennessy *v.* Wright	57 L. J. (Q.B.) 594	505
Herbert *v.* McQuade	[1902] 2 K. B. 631	339
——— *v.* Sayer	5 Q. B. 965	149
Herdman *v.* Wheeler	[1902] 1 K. B. 361	794
Hertfordshire County Council *v.* New River Company	[1901] 2 Ch. 513	742
Heyman *v.* Flewker	13 C. B. (N.S.) 519	525
Hill *v.* Pannifer	[1904] 1 K. B. 811	458
Hoddinott *v.* Newton, Chambers & Co.	[1901] A. C. 49	535
Hodson and Howes' Contract, In re	35 Ch. D. 668	447
Holliday *v.* Wakefield Corporation	[1891] A. C. 81	207, 406
Holman *v.* Peruvian Nitrate Company	5 R. 657	788
Holtby *v.* Hodgson	24 Q. B. D. 103	658
Holywell Union *v.* Halkyn District Mines Drainage Company	[1895] A. C. 117	200
Honduras Railway Company *v.* Tucker	2 Ex. D. 301	268
Hosking *v.* Phillips	3 Ex. 168	82
Houlder *v.* Weir	[1905] 2 K. B. 267	789, 791
Howe *v.* Mark, Finch & Co.	17 Q. B. D. 187	654
Hunt *v.* Fripp	[1898] 1 Ch. 675	149
—— *v.* Great Northern Railway Company	[1891] 1 Q. B. 601	536, 917
—— *v.* Williams	52 J. P. 821	452

I.

Inland Revenue Commissioners *v.* Strang	15 Sc. L. R. 704	339
Inman *v.* South Carolina Railway Company	129 U. S. 128	775
International Financial Society *v.* City of Moscow Gas Company	7 Ch. D. 241	1
Islington Borough Council *v.* London School Board	[1903] 2 K. B. 354	563

J.

Jackson *v.* Hill	13 Q. B. D. 618	536
——— *v.* Wimbledon Urban Council	[1905] 2 K. B. 27	186
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	747
James, Ex parte	L. R. 9 Ch. 609	865, 875
James Nelson & Sons, Ld. *v.* Nelson Line (Liverpool), Ld.	[1907] 1 K. B. 788, n.	787
Johnson *v.* Lindsay & Co.	[1891] A. C. 371	548
Jones *v.* Curling	13 Q. B. D. 262	658
——- *v.* Gooday	8 M. & W. 146	82
——- *v.* Hope	3 Times L. R. 247, n	712
Jordeson *v.* Sutton, Southcoates and Drypool Gas Company	[1899] 2 Ch. 217	208, 594
Joy *v.* Campbell	1 Sch. & Lef. 328	399
Justice *v.* Gosling	12 C. B. 39	674
Justitia, The	12 P. D. 145	675

K.

		PAGE
Katy, The	[1895] P. 56	788, 790
Kaufman *v.* Gerson	[1904] 1 K. B. 591	756
Kell *v.* Anderson	10 M. & W. 498	351
Kennedy *v.* Brown	13 C. B. (N.S.) 677	465
Kent *v.* Fittall	[1906] 1 K. B. 60; 1 Smith's Reg. Cas. 417	127, 130
Keown's Case	29 Ir. L. T. 81	130
Keppell *v.* Bailey	2 My. & K. 517	618
Kibble, Ex parte	L. R. 10 Ch. 373	159
Kiddle & Son *v.* Lovett	16 Q. B. D. 605	651
Kinahan *v.* Kinahan	45 Ch. D. 78	856
King *v.* Kemp	8 L. T. 255	746
Kingsford *v.* Merry	1 H. & N. 503	521
Kopitoff *v.* Wilson	1 Q. B. D. 377	662

L.

Lambeth Overseers *v.* London County Council	[1897] A. C. 625	494
Lancashire and Yorkshire Railway Company *v.* Bury Corporation	14 App. Cas. 417	741
Lavabre *v.* Wilson	1 Doug. 4th ed. p. 284	664
Lawless *v.* Anglo-Egyptian Cotton Co.	L. R. 4 Q. B. 262	375
Le Brasseur and Oakley, In re	[1896] 2 Ch. 487	465
Leduc *v.* Ward	20 Q. B. D. 475	663
Lenders *v.* Anderson	12 Q. B. D. 50	146
Lennox, Ex parte	16 Q. B. D. 315	159
Levingston *v.* Lurgan Guardians	I. R. 2 C. L. 202	920
Levy *v.* Alexander	4 Ex. 485	466
Lewis v. Clay	14 Times L. R. 149	798
Lickbarrow v. Mason	2 T. R. 63	796
Lilley *v.* Doubleday	7 Q. B. D. 510	665
Liverpool Corporation *v.* Llanfyllin Assessment Committee	[1899] 2 Q. B. 14	635
Livingstone *v.* Rawyards Coal Company	5 App. Cas. 25	404
Lloyd *v.* Fleming	L. R. 7 Q. B. 299	123
—— *v.* Guibert	L. R. 1 Q. B. 115	747
—— *v.* Sheet	93 L. T. 174	673
London and Brighton Railway Company *v.* Truman	11 App. Cas 45	592
London and North Western Railway Company *v.* Cannock	9 L. T. 325	719
—— *v.* Irthlingborough	35 L. T. 327	719
—— *v.* Llandudno Improvement Commissioners	[1897] 1 Q. B. 287	573
London and South Western Bank *v.* Wentworth	5 Ex. D. 96	798
London Corporation *v.* London Joint Stock Bank	6 App. Cas. 393	624
London County Council *v.* Attorney-General	[1901] A. C. 26	493
—— —— —— *v.* Erith Churchwardens	[1893] A. C. 562	495, 635, 720

		PAGE
London, Tilbury and Southend Railway Company and Trustees of Gower's Walk Schools, In re	24 Q. B. D. 326	17
Lord *v.* Colvin	L. R. 3 Eq. 737	334
Lynes, In re	[1893] 2 Q. B. 113	480

M.

McAndrew *v.* Barker	7 Ch. D. 701	3
M'Daid *v.* Chambers	29 Ir. L. T. 81	130
Macdougall *v.* Gardiner	1 Ch. D. 13	366
M'Kinnell *v.* Robinson	3 M. & W. 434	749
Malkin *v.* Rex	[1906] 2 K. B. 886	563
Manchester Economic Building Society, In re	24 Ch. D. 488	2
Manchester Ship Canal *v.* Rochdale Canal	81 L. T. 472	92
Marks *v.* Benjamin	5 M. & W. 565	66
Marshall *v.* Marshall	38 Ch. D. 330	858
May *v.* Lane	64 L. J. (Q.B.) 236	120
Mersey Docks and Harbour Board *v.* Birkenhead	[1901] A. C. 175	720
Mersey Docks Cases	11 H. L. C. 443	646
Mersey Docks Trustees *v.* Gibbs	L. R. 1 H. L. 93	317, 928
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	596
Metropolitan Board of Works *v.* West Ham Overseers	L. R. 6 Q. B. 193	492
Metropolitan Railway Company *v.* Fowler	[1893] A. C. 416	494
Metropolitan Water Board *v.* New River Company	20 Times L. R. 687	290
Meyer *v.* Sharpe	5 Taunt. 74	522
Midland Railway Company *v.* Robinson	15 App. Cas. 19	406
Midlothian County Council *v.* Oakbank Oil Company	5 F. 700	431
Miller *v.* Law Accident Insurance Company	[1903] 1 K. B. 712	687
Minerva, The	1 Hagg. Adm. 347	681
Minshull *v.* Oakes	2 H. & N. 793.	617
Missouri Steamship Company, In re	42 Ch. D. 321	747
Monk *v.* Whittenbury	2 B. & Ad. 484	524
Monsen *v.* Macfarlane	[1895] 2 Q. B. 562	351
Monson *v.* Tussauds, Ld.	[1894] 1 Q. B. 671	857
Moorcock, The	14 P. D. 64	319
Morgan *v.* London General Omnibus Company	12 Q. B. D. 201; 13 Q. B. D. 832	536, 917
——— *v.* Vale of Neath Railway Company	L. R. 1 Q. B. 149	550
Morris *v.* Blackman	2 H. & C. 912	442
——— *v.* Oceanic Steam Navigation Company	16 Times L R. 533	775
Mortgage Insurance Corporation *v.* Inland Revenue Commissioners	21 Q. B. D. 352	250
Mullett *v.* Huchison	7 B. & C. 639	466
Murphy *v.* Coffin	12 Q. B. D. 87.	350
Myers *v.* Defries	4 Ex. D. 176	658
——— (No. 2)	5 Ex. D. 15, 180	658

N.

		PAGE
Nash *v.* De Freville	[1900] 2 Q. B. 72	797
National Telephone Company *v.* Inland Revenue Commissioners	[1899] 1 Q. B. 250	249
Nelson *v.* Dahl	12 Ch. D. 568	344
Neutralitet, The	3 C. Rob. 295	672
New Callao, In re	22 Ch. D. 484	2
New London Credit Syndicate *v.* Neale	[1898] 2 Q. B. 487	11
Newcastle (Duke of) *v.* Hundred of Broxtowe	4 B. & Ad. 273.	86
Newmarket Railway Company *v.* St. Andrew's-the-Less, Cambridge	3 E. & B. 94	719
Newport Dock Company *v.* Newport Local Board	2 B. & S. 708	573
Noakes *v.* Inland Revenue Commissioners	83 L. T. 714	258
——— & Co. *v.* Rice	[1902] A. C. 24	617
North and South West Junction Railway Company *v.* Brentford Union	18 Q. B. D. 740, 13 App. Cas. 592	720
Northallerton Corporation	1 O'M. & H. 171	141
Nottingham County Council *v.* Manchester, Sheffield, and Lincolnshire Railway Company	71 L. T. 430	741

O.

O'Donovan and Cameron, Swan & Co., In re	[1901] 2 I. R. 633	221
Ohlson's Case	[1891] 1 Q. B. 485	102, 108
O'Neill *v.* Armstrong, Mitchell & Co.	[1895] 2 Q. B. 70, 418.	672
Oppenheimer *v.* Attenborough & Son	[1907] 1 K. B. 510	522
——— *v.* Frazer & Wyatt	[1907] 1 K. B. 519	510
Oriental Steamship Company *v.* Tylor	[1893] 2 Q. B. 518	814
Oxford Poor Rate Case.	8 E. & B. 184	32

P.

Palmer *v.* Blackburn	1 Bing. 61	259
——— *v.* Tyler.	61 J. P. 389	284
Parkes *v.* Prescott	L. R. 4 Ex. 169	391
Parnaby *v.* Lancaster Canal Company	11 Ad. & E. 223	316
Peebles *v.* Oswaldtwistle Urban Council	[1896] 2 Q. B. 159	223
Peek *v.* Gurney	L. R. 6 H. L. 377	275
Pellas *v.* Neptune Marine Insurance Company	5 C. P. D. 34	120
Penrhyn *v.* Licensed Victuallers' Mirror	7 Times L. R. 1	505
Pentland, The	13 Times L. R. 430	662
Petrel, The	[1893] P. 320	548
Petrie *v.* Nuttall	11 Ex. 569	674
Phelps, James & Co. *v.* Hill	[1891] 1 Q. B. 605	665
Phœnix Insurance Company *v.* Erie and Western Transportation Company	117 U. S. 312	775
Popplewell *v.* Hodkinson	L. R. 4 Ex. 248	591
Powell *v.* Kempton Park Racecourse Company	[1899] A. C. 143	65

		PAGE
Powell *v.* Main Colliery Company	[1900] A. C. 366	222
Poynting *v.* Faulkner	93 L. T. 367	339
Price *v.* Union Lighterage Company	[1903] 1 K. B. 750; [1904] 1 K. B. 412	769
Priestley *v.* Fowler	3 M. & W. 1	548
Prosser *v.* Allen	Gow. 117	712
Pruessing *v.* Ing	4 B. & A. 204	250
Pullman *v.* Hill & Co.	[1891] 1 Q. B. 524	371
Pust *v.* Dowie	32 L. J. (Q.B.) 179; 5 B. & S. 20	662
Pyke, Ex parte	8 Ch. D. 754	750
Pyman *v.* Dreyfus	24 Q. B. D. 152	344

Q.

Quarrier *v.* Colston	1 Ph. 147	749

R.

Randall *v.* Raper	E. B. & E. 84; 27 L. J. (Q. B.) 266	92
Reg. *v.* Abney Park Cemetery Company	L. R. 8 Q. B. 515	32
—— *v.* Bate	Cited in Turner on the Pawnbrokers Act, 1872, 3rd ed. p. 141	113
—— *v.* Birmingham and Gloucester Railway Company	2 Q. B. 47	742
—— *v.* Bradshaw	2 E. & E. 836	198
—— *v.* Bridge	24 Q. B. D. 609	910
—— *v.* Buckmaster	20 Q. B. D. 182	513
—— *v.* Burton	13 Cox, C. C. 71	43
—— *v.* Coney	8 Q. B. D. 534	42
—— *v.* Cooper	8 Q. B. 533	391
—— *v.* Crawshaw	Bell, C. C. 303	66
—— *v.* Davies	[1897] 2 Q. B. 199	66
—— *v.* Eastern Counties Railway Company	23 L. J. (M.C.) 96, n.	720
—— *v.* Grand Junction Railway Company	4 Q. B. 18	719
—— *v.* Great Western Railway Company	6 Q. B. 179	719
—— *v.* ————	15 Q. B. 379, 1085	719
—— *v.* Greenwood	2 Den. C. C. 453	43
—— *v.* Harris	10 Cox, C. C. 352	452
—— *v.* Hastings Corporation	[1897] 1 Q. B. 46	187
—— *v.* Hunt	6 E. & B. 408	912
—— *v.* Inland Revenue Commissioners	[1891] 1 Q. B. 485	108
—— *v.* ————	21 Q. B. D. 569	111
—— *v.* Jameson	[1896] 2 Q. B. 425	385
—— *v.* Llantrissant	L. R. 4 Q. B. 354	717
—— *v.* London and Birmingham Railway Company	1 Rail. Cas. 317	742
—— *v.* London and North Western Railway Company	L. R. 9 Q. B. 134	719
—— *v.* London, Brighton and South Coast Railway Company	15 Q. B. 313	719
—— *v.* London School Board	55 L. J. (M.C.) 33; 17 Q. B. D. 738	492, 637, 720
—— *v.* Metropolitan Board of Works	L. R. 4 Q. B. 15	492

		PAGE
Reg. *v.* Overton	23 L. J. (M.C.) 29	467
—— *v.* Rhymney Railway Company	L. R. 4 Q. B. 276	635
—— *v.* St. Mary Abbotts, Kensington (Inhabitants)	12 A. & E. 824	32
—— *v.* United Kingdom Electric Telegraph Company	31 L. J. (M.C.) 166	91
—— *v.* Verrall	1 Q. B. D. 9	200
—— *v.* West Middlesex Waterworks	1 E. & E. 716	719
—— *v.* Williams	9 App. Cas. 418	317
—— *v.* Wycombe Railway Company	L. R. 2 Q. B. 310	207
Reichel *v.* Magrath	14 App. Cas. 665	863
Reid *v.* Hollinshead	4 B. & C. 867	520
Remmington *v.* Scoles	[1897] 2 Ch. 1	860
Rex *v.* Baxter	5 T. R. 83; 2 Leach, 578	384
—— *v.* Bedworth	8 East, 387	198
—— *v.* Burdett	1 St. Tr. (N.S.) 1; 4 B. & Al. 95	390
—— *v.* Incledon	13 East, 164	87
—— *v.* James	[1902] 1 K. B. 540	384
—— *v.* Jarvis	1 East, 643, n.	385
—— *v.* Kingswinford	7 B. & C. 236	719
—— *v.* Loxdale	1 Burr. 447	105
—— *v.* Mirfield	10 East, 219	198
—— *v.* Mitchell	10 East, 511	141
—— *v.* Mountford	[1906] 2 K. B. 814	26
—— *v.* New River Company	1 M. & S. 503	719
—— *v.* Oliphant	[1905] 2 K. B. 67	390
—— *v.* Pappineau	2 Str. 686	87
—— *v.* St. Luke's Hospital	2 Burr. 1053	198
—— *v.* Staffordshire and Worcestershire Canal Company	65 J. P. 505	741
—— *v.* Theed	1 Strange, 608	384
—— *v.* Ward	4 Ad. & E. 384	91
—— *v.* West Riding of York	7 East, 588	741
Reynolds *v.* Presteign District Council	[1896] 1 Q. B. 604	81
Richmond Hill Steamship Company *v.* Trinity House Corporation	[1896] 2 Q. B. 134	604
Ridout *v* Green	87 L. T. 679; 18 Times L. R. 709	72
Rigby *v.* Connol	14 Ch. D. 482	365
River Lagan, The	6 Asp. M. L. Cas. 281	268
Roberts *v.* Aylesbury Overseers	1 E. & B. 423	200
Robinson *v.* Bland	1 W. Bl. 234; 2 Burr. 1077	746
Robson *v.* Hyde	Cald. 310	33
Rodocanachi *v.* Milburn	18 Q. B. D. 67	814
Rolls *v.* St. George, Southwark (Vestry of)	14 Ch. D. 785	81
Rothschild *v.* Currie	1 Q. B. 43	747
——— & Sons *v.* Inland Revenue Commissioners	[1894] 2 Q. B. 142	250
Rousillon *v.* Rousillon	14 Ch. D. 351	237, 756
Royal Exchange Assurance Corporation *v.* Sjoforsakrings Aktiebolaget Vega	[1902] 2 K. B. 384	747
Russell (Earl), Trial of	[1901] A. C. 446	385

S.

Sadler *v.* Great Western Railway Company	[1896] A. C. 450	264

		PAGE
St. Martin's Vestry *v.* Gordon	[1891] 1 Q. B. 61	912
St. Pancras Vestry *v.* Batterbury	2 C. B. (N.S.) 477	883
St. Paul Fire and Marine Insurance Company *v.* Morice	11 Com. Cas. 153	687
Salt Union *v.* Brunner, Mond & Co.	[1906] 2 K. B. 822	602
Sandback Charity Trustees *v.* North Staffordshire Railway Company	3 Q. B. D. 1	54
Sanders *v.* Jenkins	[1897] 1 Q. B. 93; 2 Com. Cas. 12	344
Sanderson *v.* Blyth Theatre Company	[1903] 2 K. B. 533	264
Sandys *v.* Small	3 Q. B. D. 449	281
Scaramanga *v.* Stamp	5 C. P. D. 295	663
Schibsby *v.* Westenholz	L. R. 6 Q. B. 155	237
Schloss Brothers *v.* Stevens	[1906] 2 K. B. 665	687
Scholfield *v.* Londesborough (Lord)	[1896] A. C. 514	487, 797
Searle *v.* Lindsay	11 C. B. (N.S.) 429	549
Secretary of State in Council of India *v.* Scoble	[1903] A. C. 299	494
Seymour *v.* Maddox	16 Q. B. 326	548
Shand *v.* Sanderson	4 H. & N. 381	831
Sheffield Corporation *v.* Barclay	[1905] A. C. 392	812, 890
Sheffield Waterworks Company *v.* Brooks	8 Q. B. D. 632	291
Shepherd *v.* Hills	11 Ex. 55	884
Sheppard *v.* Union Bank of London	7 H. & N. 661	521
Shrewsbury (Earl) *v.* Wirral Railways Committee	[1895] 2 Ch. 812	55
Shutt *v.* Lewis	5 Esp. 128	66
Sibery *v.* Connelly	94 L. T. 198	673
——— *v.* ———	22 Times L. R. 174	840
Simm *v.* Anglo-American Telegraph Company	5 Q. B. D. 188	897
Simmonds, Ex parte	16 Q. B. D. 308	868
Simpson *v.* Ebbw Vale Steel, Iron, and Coal Company	[1905] 1 K. B. 453	532
Sloman *v.* Bank of England	14 Sim. 475	898
Smith *v.* Brown	L. R. 6 Q. B. 729	105
——— *v.* Great Western Railway Company	3 App. Cas. 165	402
——— *v.* Steele	L. R. 10 Q. B. 125	548
Smurthwaite *v.* Hannay	[1894] A. C. 494	267
South Eastern Railway Company *v.* Dorking	3 E. & B. 491	717
South Wales Railway Company *v.* Swansea Local Board of Health	4 E. & B. 189	573
Southampton and Itchin Bridge Company *v.* Southampton Local Board	8 E. & B. 801	922
Southcote *v.* Stanley	1 H. & N. 247	553
Southend Corporation *v.* White	83 L. T. 408	198
Spencer's Case	5 Rep. 16; 1 Smith L. C. 11th ed. p. 55	615
Spill *v.* Maule	L. R. 4 Ex. 232	376
Stacey *v.* Whitehurst	18 C. B. (N.S.) 344	43
Stanhope *v.* Smith	5 Mod. 351	763
Starkey *v.* Bank of England	[1903] A. C. 114	893
Staunton *v.* Powell	15 W. R. 362	198
Stevens *v.* Copp	L. R. 4 Ex. 20	619
Stockport, Timperley and Altringham Railway Company, In re	33 L. J. (Q.B.) 251	19

		PAGE
Story *v.* Sheard	[1892] 2 Q. B. 515	222
Stroud *v.* Wandsworth District Board	[1894] 2 Q. B. 1	883
Stumore, Weston & Co. *v.* Breen	12 App. Cas. 698	812
Sturgeon *v.* Salmon	22 Times L. R. 584	237
Sussex Peerage Claim	6 St. Tr. (N.S.) 79	703
Sutton and Elliott, In re	11 Q. B. D. 377	158
——— *v.* Ciceri	15 App. Cas. 144	774
Sunderland Overseers *v.* Sunderland Union	34 L. J. (M.C.) 121	635
Swan, Ex parte	7 C. B. (N.S.) 400	798
——— *v.* North British Australasian Company	2 H. & C. 175	797
Swansea Improvements and Tramway Company *v.* Swansea Urban Sanitary Authority	[1892] 1 Q. B. 357	570
Swindon Waterworks Company *v.* Wilts and Berks Canal Navigation Company	L. R. 7 H. L. 697	598

T.

Tapscott *v.* Balfour	L. R. 8 C. P. 46	349
Tattersall *v.* National Steamship Company	12 Q. B. D. 297	775
Taylor *v.* Smetten	11 Q. B. D. 207	452
Tendring Union *v.* Dowton	[1891] 3 Ch. 265	447
Texas Land and Cattle Company *v.* Inland Revenue Commissioners	16 R. 69	257
Tharsis Sulphur Company *v.* Morel	[1891] 2 Q. B. 647	348
Thibault *v.* Gibson	12 M. & W. 88	386
Thomas *v.* Hayward	L. R. 4 Ex. 311	617
Thompson *v.* Eccles Corporation	[1904] 2 K. B. 1; [1905] 1 K. B. 110	187
——— *v.* London County Council	[1899] 1 Q. B. 840	266
Tildesley *v.* Harper	10 Ch. D. 393	3
Tomkins *v.* Ashby	6 B. & C. 541	466
Toms *v.* Luckett	5 C. B. 23	138
Tozier *v.* Hawkins	15 Q. B. D. 680	857
Travis *v.* Utley	[1894] 1 Q. B. 233	190
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	80, 493
Tunnicliffe & Hampson *v.* West Leigh Colliery Company	[1906] 2 Ch. 22	88
Turnbull *v.* Walker	67 L. T. 767	238
Turner, Ex parte	24 L. J. (Ch.) 71	155
——— *v.* Coxon	22 Q. B. D. 150	339
——— *v.* Jones	1 H. & N. 878	624
Turton *v.* Cooper	92 L. T. 863	339
Tuson *v.* Evans	12 Ad. & E. 733	376
Twickenham Urban Council *v.* Munton	[1899] 1 Ch. 168	447
Twycross *v.* Grant	4 C. P. D. 40	222
Tyler, In re	[1907] 1 K. B. 865	877

U.

Union Credit Bank *v.* Mersey Docks and Harbour Board	[1899] 2 Q. B. 205	797
Utterson *v.* Vernon	3 T. R. 539	399

V.

		PAGE
Vernon *v.* Smith	5 B. & A. 1	616
Vickers *v.* Hertz	L. R. 2 H. L. Sc. 113	524
Vortigern, The	[1899] P. 140	848

W.

Wagstaffe *v.* Bentley	[1902] 1 K. B. 124	72, 862
Wakefield Light Railways Company *v.* Wakefield Corporation	[1906] 2 K. B 140	573
Walker *v.* Brisley	[1900] 2 Q. B. 735	635
——— *v.* Walker	12 Mod. 258	763
Wandsworth Board of Works *v.* United Telephone Company	13 Q. B. D. 904	81
Ward *v.* Portsmouth Corporation	[1898] 2 Ch. 191	418
Washer *v.* Elliott	1 C. P. D. 169	884
West Ham Churchwardens *v.* London County Council	[1893] A. C. 562	492
West, King & Adams, In re	[1892] 2 Q. B. 102	158
West Riding of Yorkshire Rivers Board *v.* Scarr End Mill Company	65 J. P. 776	431
Westminster Corporation *v.* Johnson	[1904] 2 K. B. 737	494
Wheatley *v.* Patrick	2 M. & W. 650.	43
Wheeler *v.* United Telephone Company	13 Q. B. D. 597	72
Wigsell *v.* School for Indigent Blind	8 Q. B. D. 357.	82
Williams *v.* London and North-Western Railway Company	[1900] 1 Q. B. 761	573
——— *v.* Swansea Harbour Trustees	14 C. B. (N.S.) 845	310
Williamson *v.* Freer	L. R. 9 C P. 393	375
Wills *v.* Noott	4 Tyrw. 726	250
Wilson *v.* Merry	L. R. 1 H. L. Sc. 326	552
———, Sons & Co. *v.* Owners of Cargo per Xantho	12 App. Cas. 503	665
Wolfe *v.* Surrey County Council	[1905] 1 K. B. 439	33
Wood *v.* Dunn	L. R. 2 Q. B. 73	625
Woods *v.* Durrant	16 M. & W. 149	458
Worms *v.* Storey	11 Ex. 427	662
Worthington *v.* Wigley	3 Bing. N. C. 454	14
Wright *v.* Ingle	16 Q. B. D. 379	32
Wynne *v.* Jackson	2 Russ. 351	277

Y.

Yarmouth *v.* France	19 Q. B. D. 647	917
Yorkshire Miners' Association *v.* Howden	[1905] A. C. 256	364
Yorkshire (Woollen District) Electric Trams, Ld. *v.* Ellis	92 L. T. 202	573
Ystradyfodwg and Pontypridd Main Sewerage Board *v.* Newport Assessment Committee	[1901] 1 K. B. 406	492

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

ollowed. Re MACADAM (No. 2). [1950] All E.R. 659.

[IN THE COURT OF APPEAL.]

C. A.

1906

Nov. 5.

IN THE MATTER OF AN ARBITRATION BETWEEN COLES AND RAVENSHEAR.

Practice—Appeal—Time for Appealing—Mistake as to Effect of Rule—Order in Matter not being an Action—Appeal brought too late—Special Leave to Appeal—Discretion of Court—Order LVIII., *r.* 15.

Where, through a mistake of counsel as to the effect of Order LVIII., r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing:—

Held, upon the authority of *In re Helsby*, [1894] 1 Q. B. 742, and *International Financial Society* v. *City of Moscow Gas Co.*, (1877) 7 Ch. D. 241, that there was no sufficient ground for granting special leave to appeal under the before-mentioned rule.

APPLICATION under Order LVIII., r. 15, for special leave to appeal from an order of a Divisional Court.

A reference having taken place under an arbitration clause in a building agreement, the referee by his award found certain

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

facts, and awarded that certain sums should be paid by the building owner to the builder. On an application by the building owner, the Divisional Court, on August 6 last, set aside the award on the ground that it appeared, from what had taken place on the reference, that the parties had not intended to leave questions of law for final determination by the referee as arbitrator, and that from the facts as found by the award it was clear that the referee had awarded to the builder sums to which he was not legally entitled.

In the course of a discussion, which took place immediately after the decision of the Divisional Court, between the solicitor for the builder and the leading counsel who had appeared for him, as to whether there should be an appeal, the counsel, through a mistake as to the effect of the rule on the subject (Order LVIII., r. 15) as applicable to the present case, intimated an opinion that, the order of the Divisional Court being a final order, the period within which an appeal must be brought under the rule was three months, which opinion was confirmed by his junior. Acting on this opinion the solicitor did not cause notice of appeal to be given till October 30. By Order LVIII., r. 15, "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days."

C. A. Russell, K.C., for the appellant. The Court clearly has a discretion in the matter. The notice of appeal was not given in time through a mere slip of counsel as to the effect of the rule, and the respondent has not thereby sustained any damage which is not capable of being compensated by costs. It is submitted that, under these circumstances, the justice of the case requires that special leave to appeal should be given upon such terms as the Court may think just. [He cited *In re New Callao* (1); *In re Blyth and Young* (2); *Cusack* v. *London and North Western Ry. Co.* (3); *In re Manchester Economic Building Society* (4);

(1) (1882) 22 Ch. D. 484.
(2) (1880) 13 Ch. D. 416.
(3) [1891] 1 Q. B. 347.
(4) (1883) 24 Ch. D. 488.

McAndrew v. *Barker* (1); *Tildesley* v. *Harper* (2); *Cropper* v. *Smith.* (3)]

W. R. Warren (*Rawlinson, K.C.*, with him), for the respondent. There having been no appeal against the order within the time limited by the rules, the party who was successful in the Court below has prima facie a vested right under the order. The mere fact of a mistake having been made as to the effect of a perfectly plain provision of the rules cannot of itself afford a sufficient ground for giving special leave to appeal. [He cited *International Financial Society* v. *City of Moscow Gas Co.* (4); *In re Helsby* (5); *Collins* v. *Vestry of Paddington* (6); *Esdaile* v. *Payne.* (7)]

C. A. Russell, K.C., in reply.

COLLINS M.R. This is an application to extend the time for appealing to this Court; and no doubt the Court has jurisdiction to give special leave to appeal under Order LVIII., r. 15, which provides that "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal shall, except by such leave, be brought after the expiration of three months." In this case the reason why the appeal was not brought within the fourteen days was that counsel, while discussing the question of appealing, after the decision of the Court below, and, as I understand, within the precincts of the Court, expressed an off-hand opinion that by the terms of the rule the appeal need not be brought within the fourteen days, which opinion thus given was afterwards confirmed by the junior counsel, and, on the strength of this opinion so expressed, the notice of appeal was not given till after the expiration of that period. The result appears to be that, unless that slip can be cured, the case cannot be heard in this Court on the merits, which is said to be an injustice to the appellant, though

(1) (1878) 7 Ch. D. 701.
(2) (1878) 10 Ch. D. 393.
(3) (1884) 26 Ch. D. 700, at pp. 710, 711.
(4) 7 Ch. D. 241.
(5) [1894] 1 Q. B. 742.
(6) (1880) 5 Q. B. D. 368.
(7) (1889) 40 Ch. D. 520.

C A. 1906

COLES AND RAVENSHEAR, *In re.*

Collins M.R.

it must be remembered that the case has been fully heard on the merits in the Court below, and the presumption in this Court must, until the contrary is shewn, be that the decision of that Court was correct. The question is whether under these circumstances we ought to grant an extension of time. I confess that, if the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended. Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case. In the case of *In re Manchester Economic Building Society* (1), Bowen L.J., in giving judgment to the same effect as Brett M.R. and Cotton L.J., laid down what seems to me to be the sound general rule on this subject, and that which I should desire to follow. He said, with regard to the circumstances under which the discretion of the Court to grant leave to appeal should be exercised: "The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case—otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered. If the appellant is asking for what is evidently unjust, it is clear that he ought not to have it; if he is asking for what may lead to injustice, he ought not to have it except on the terms which would prevent any injustice possibly being done, and, for that reason, if any of the respondents here had shewn that injustice was likely to arise in their particular case, I think terms ought to have been imposed; but, if the person who is asking for leave to appeal after twenty-one days is

(1) 24 Ch. D. 488

only asking for what is just, why should not he have it?" Therefore, where there has been a perfectly bona fide mistake, and no damage has thereby been done to the opposite party which cannot be sufficiently compensated by costs, I should, if the matter were at large, be of opinion that special leave to appeal should be granted. But in this case I do not feel myself at large in the matter; for, though the current of authority on the subject has not been uniform, there are certainly one or two, if not more, authorities, applicable to the present case, which appear to me to be practically binding upon us in this Court, and which compel me to arrive at a different conclusion from that to which I might in the absence of authority have come. The last case on the subject appears to be *In re Helsby*. (1) In that case, with reference to r. 130 of the Bankruptcy Rules, 1886, which provided that, "subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days," Lord Halsbury L.C. said: "The rule gives the Court power 'under special circumstances' to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellants' solicitors. If that is a 'special circumstance,' then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time." Lopes L.J. adopted the opinion of the Lord Chancellor on the subject; and Davey L.J. said: "Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him,' or in a case of 'inevitable accident.' I cannot see that a mistake made by the solicitor of the party who is applying for an extension of the time is a sufficient ground for extending it." The only difference that I

(1) [1894] 1 Q. B. 742.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Collins M.R.

can see between that case and the present is that there the mistake was that of a solicitor's clerk, whereas here it was that of counsel. That does not appear to me to make any difference in point of principle. It is to be observed that that case was decided several years after the case in which Bowen L.J. made the observations to which I have referred, and it is also in conformity with the view of James L.J. in *International Financial Society* v. *City of Moscow Gas Co.* (1) In the face of these decisions I find it difficult to apply to the present case any other rule than that adopted in those cases, although there may be authorities containing expressions which appear to tend in favour of the view which I should have preferred to adopt. Under these circumstances I think that the application must be dismissed.

COZENS-HARDY L.J. I regret that I feel obliged to arrive at the same conclusion. If the matter had been free from authority, I should have preferred, in a case where there has been an honest mistake by the legal adviser of a party, and nothing has taken place since the order appealed against which would make it unjust for the Court to interfere, or for which costs would not be an adequate compensation, to hold that the Court would be justified in giving special leave to appeal under Order LVIII., r. 15. The course of the authorities on the subject has been far from uniform. The current at one time ran very strongly in favour of the rigid application of the rule as to time. Then there was a turn of the tide. In the case of *Cusack* v. *London and North Western Ry. Co.* (2), decided by Lord Esher M.R., Bowen L.J. and Fry L.J., in which an application to extend the time for entering an appeal from a judgment of a county court was granted, Lord Esher M.R. pointed out that the view once taken in *Collins* v. *Vestry of Paddington* (3) had been departed from and could not then be supported, and said: "I think we must say that there is a discretion in such a case as the present which the Court cannot exercise loosely, but which should be exercised on a consideration of the circumstances of each case as it arises." Bowen L.J.

(1) 7 Ch D. 241. (2) [1891] 1 Q. B. 347.
(3) 5 Q. B. D. 368.

said: "There have been a number of cases since *Collins* v. *Vestry of Paddington* (1) in which the Court of Appeal has discussed that case. The conclusion arrived at has been that no rule fettering discretion should be laid down, and that the Court is not bound to act on any such rule. The case belonged to a period in which stricter views on this point were held; but since that time eminent judges, who were inclined at one time to lay down a severe rule upon the lines of which the discretion should be exercised, one and all came round to the now generally received opinion, that in such a matter no hard and fast line can be laid down, but that each case must be considered solely on its merits." That case followed the case of *In re Manchester Economic Building Society* (2), in which Brett M.R., as he then was, Cotton L.J. and Bowen L.J. had taken substantially the same view. It appears to me that those cases are really inconsistent with the earlier authorities. But then we come to the last case on the subject, *In re Helsby*. (3) It is true that in that case the later authorities to which I have referred do not appear to have been cited; but I do not feel it possible to distinguish the facts of that case from those of the present, and it appears to me to indicate a further change to some extent in the current of authority on the subject. I do not think that it would be right for us, in the face of that authority, to do that which would otherwise have been in accordance with my own view, namely, allow this application on terms as to costs.

FARWELL L.J. I agree in the conclusion at which the other members of the Court have arrived, but I must confess that I do not share the regret expressed by them. Whether counsel, in giving the opinion which he did, had the terms of the rule before him, or, as appears to me more probable, spoke merely on his recollection of those terms, I do not know; but it cannot, I think, be disputed that the terms of Order LVIII., r. 15, are perfectly clear, and really afford no room for any misconstruction of them in the present case. I agree that it is undesirable, generally speaking, to fetter a discretion given under the Rules

(1) 5 Q. B. D. 368. (2) 24 Ch. D. 488.
(3) [1894] 1 Q. B. 742.

C. A. 1906

COLES AND RAVENSHEAR, *In re.*

Farwell L.J

by hard and fast lines; but applications for special leave to appeal in circumstances similar to those of the present case are very numerous; and I must say that, in my opinion, it is better that a practice with regard to the exercise of discretion under such circumstances, which has grown up on the authority of eminent judges, should not be departed from, even although the result may be that some appeals, which might possibly be successful if heard, are never heard. The litigant in such a case has not been deprived of a hearing. His case has been heard in the Court below; and I think that, when, having failed to give notice of appeal in due time, he comes to this Court for special leave to appeal, he ought, as laid down by Cotton L.J. in *In re Manchester Economic Building Society* (1), to shew some special circumstance which entitles him to such indulgence. The learned Lord Justice said in that case: "This, I think, may be laid down, that, when the Rules and the Act of Parliament say that an appeal is to be within a certain time unless special leave shall be given by the Court of Appeal to appeal after that time, the Court does not grant leave unless there is something which, in the opinion of the Court, entitles the person who applies for extension of time to be relieved against the bar established by the Orders and the Act of Parliament. It has been called an equity, but that is not a proper term; it is something which entitles him to ask for the indulgence of the Court, to ask to be relieved from the legal bar that there is in the Orders and Act of Parliament." A mere slip or blunder on the part of a litigant's legal adviser cannot, in my view, entitle him to anything at all. That would have been my view apart from any authority, but I find very high authority for it in the judgment of James L.J. in *International Financial Society* v. *City of Moscow Gas Co.* (2) He there said: "The limitation of the time to appeal is a right given to the person in whose favour a judge has decided. I think we ought not to enlarge that time unless under some very special circumstance indeed, that is to say, if there has been any misleading through any conduct of the other side, as was mentioned in the analogous case of vacating

(1) 24 Ch. D. 488, at p. 499. (2) 7 Ch. D. 241.

inrolment which came before Lord Cottenham, and afterwards before Lord Chelmsford, in which it was laid down that the right of the suitor was ex debito justitiæ to keep his inrolment of the decree if it was made in due time, unless in very special cases. For instance, where there was anything like misleading on the part of the other side, or where some mistake had been made in the office itself, and a party was misled by an officer of the Court, or again, where some sudden accident which could not have been foreseen—some sudden death, or something of that kind, which accounted for the delay; in such cases leave might be given. But, simply where a man says, 'I looked at the order, and I bona fide came to the conclusion that I had up to a particular day, and I determined to take the last day I could,' then he has taken upon himself to calculate the last day, and, if he has made a mistake in calculating the last day, he must abide by the consequences of that mistake." Baggallay L.J. in the same case said: "This Court has before expressed an opinion that the mere fact of a misunderstanding by the parties concerned of the provisions of the Rules is not such a special circumstance as to induce the Court to give that special leave which is required to extend the time"; and Thesiger L.J. agreed. Again, there was an expression of the same opinion by three judges in the case of *In re Helsby* (1), to which the Master of the Rolls has referred. So that we have the opinion of six judges to the effect that a mistake as to the meaning of the rules is not a sufficient ground for granting special leave to appeal. Under these circumstances, it seems to me impossible for us to say that such a mistake, even on the part of eminent counsel, is a sufficient ground for granting this application.

Application dismissed.

Solicitors for applicant: *Law & Worssam, for Bond & Pearce, Plymouth.*

Solicitor for respondent: *James Morley.*

(1) [1894] 1 Q. B. 742.

E. L.

C. A.
1906
Nov. 13

[IN THE COURT OF APPEAL.]

HENDERSON *v.* ARTHUR.

Landlord and Tenant—Lease under Seal—Covenant to pay Rent in Advance—Antecedent Agreement to take Bill for Rent—Contract—Evidence, Inadmissibility of—Collateral Agreement.

Where, in an action by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of the rent quarterly in advance, the defendant set up by way of defence that by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease the plaintiff agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, and that the defendant had tendered such a bill to the plaintiff in respect of the rent sued for, which the plaintiff refused to take :—

Held, that evidence of such an agreement as alleged was inadmissible.

Appeal from the judgment of Lord Alverstone C.J. in an action tried by him without a jury.

The action was by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of rent. By indenture of lease, dated November 28, 1904, the plaintiff had demised a theatre to the defendant, to hold for the term of fourteen years, "yielding and paying therefor during the said term the yearly rent of 2500*l*. . . . . to be paid in advance during the said term by equal quarterly payments" on the days specified in the lease, and the defendant covenanted with the plaintiff to "pay the said yearly rent hereby reserved at the times and in manner hereinbefore appointed." The defence set up was that, by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease, the plaintiff had agreed to take a bill, payable at three months, by way of payment of each quarter's rent in advance as it became due; and that the defendant had, in accordance with that agreement, tendered to the plaintiff his acceptance for the rent sued for, which the plaintiff refused to take. Evidence of the antecedent agreement was tendered by the defendant, but was objected to by the plaintiff's counsel as inadmissible. No claim was set up by the defendant for rectification of the lease. The Lord Chief

Justice admitted the evidence, and, finding that the alleged agreement was proved (1), gave judgment for the defendant.

C. A. 1906

HENDERSON v. ARTHUR.

Montague Lush, K.C. (*W. E. Vernon* with him), for the plaintiff. It is, of course, clear on general principles that, where a formal contract by deed or in writing has been executed by parties as constituting the contract between them, evidence cannot be admitted of previous negotiations or agreements dealing with the same subject-matters as are dealt with by that instrument; but it has, no doubt, been held that effect may be given to a collateral agreement with regard to a collateral matter not dealt with by the main agreement. The learned Lord Chief Justice held that the parol agreement alleged in this case was collateral to the lease, and did not contradict its terms so as to be inadmissible in evidence. But this view cannot, it is submitted, be sustained when the nature and true construction of the lease are considered. The lease is an instrument under seal which deals expressly with the payment of rent; and the words used in it must receive their ordinary legal meaning. Any antecedent agreement which would vary that meaning is therefore inadmissible. It is clear that the words "paying" and "pay" as used in the reddendum of the lease and the covenant to pay rent mean payment in cash. The giving of a bill is not payment of a debt; it merely suspends the remedy. An agreement to take a bill at three months is absolutely inconsistent with the covenant to pay in advance. [He cited *New London Credit Syndicate* v. *Neale*.(2)]

P. Rose-Innes (*McCall, K.C.*, with him), for the defendant. The agreement in question does not contradict the lease so as to be inadmissible. The lease says nothing as to mode of payment. Payment does not necessarily mean payment in cash. Payment by bill is a mode of payment well known in business matters; and it may be called a payment in advance, for the plaintiff can obtain his money by discounting the bill. The

(1) The plaintiff denied that there had been such an agreement as alleged, and appealed against this finding, but it became unnecessary to discuss this question, as the Court of Appeal held that the existence of such an agreement would be immaterial.

(2) [1898] 2 Q. B. 487.

C. A. 1906

HENDERSON v. ARTHUR.

agreement is admissible to shew in what sense the parties used the word "pay" in the lease, that word being susceptible of more than one meaning. It would be unjust that, when, as a condition of the defendant's entering into the lease, there was a stipulation that payment by bill should be accepted as payment in advance under it, the defendant should be held bound to pay in cash.

Montague Lush, K.C., for the plaintiff, was not called upon to reply.

COLLINS M.R. This is an appeal from the judgment of the Lord Chief Justice in an action upon a covenant for payment of rent in a lease. The covenant sued upon is, in effect, for the payment of the rent reserved in advance by equal quarterly payments on the days specified in the lease. The terms of that covenant are perfectly clear, and their meaning appears to me unquestionably to be that the rent shall be paid in advance in cash. The defence set up by the defendant is that there was an agreement antecedent to the lease in point of time, by which the parties agreed that, instead of payment in advance of each quarter's rent in cash, the lessor should be satisfied by the lessee's giving in respect thereof bills at three months. Assuming that there was in fact such an agreement, the question is whether it is legally available for the purpose of defeating the claim of the lessor upon the covenant. It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter. I do not see how, in this case, the covenant in the lease and the antecedent parol agreement can co-exist, and the subsequent deed has the effect of wiping out any previous agreement dealing with the same subject-matter. It was somewhat faintly suggested that the agreement relied upon was a collateral agreement in the nature of a condition upon which the lease was entered into by the defendant. But it appears to me, when the terms of the agreement are looked at, that it is not a merely collateral

agreement, but provides in another and contradictory manner for doing what was subsequently provided for by the lease. Under these circumstances I think that the agreement relied upon was not admissible in evidence, and that the appeal must therefore be allowed.

COZENS-HARDY L.J. I agree, and have very little to add. We are asked, as it appears to me, to give effect to an antecedent parol agreement in order to contradict the terms of the lease, and to give it a meaning different from that which the law would otherwise give to it. To do so would, I think, be contrary to the general principles of the law of evidence. The terms of an antecedent agreement made by parol may be very material in a case where it is a question of the rectification of a written contract on the ground that it does not give effect to the real agreement between the parties, but it is only in such a case that the Court can take such an agreement into consideration.

FARWELL L.J. I agree. The Lord Chief Justice appears to have held that "pay" in the covenant to pay rent was an ambiguous expression, and might mean either payment in cash or by bill, and he appears to have admitted parol evidence on this footing. But if that contention were correct, modern conveyancers are less wise than their fathers in discarding the old familiar form of "well in hand truly pay in lawful money of Great Britain" from covenants to pay rent. But such contention is inconsistent with the decision in *Davis* v. *Gyde* (1), as explained by Maule J. in *Belshaw* v. *Bush*. (2) The learned judge in the latter case, after pointing out that the cases in which a bill given on account of a simple contract debt has been held to operate as a conditional payment, and suspend the remedy, may be supported on the ground of an agreement implied in law from giving and receiving such a security, proceeds to say: "The cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a

(1) (1835) 2 A. & E. 623. (2) (1851) 11 C. B. 191.

C. A. 1906

HENDERSON v. ARTHUR.

Farwell L.J.

conditional payment does not arise when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis* v. *Gyde* (1), in which, the debt being for rent, the plaintiff would part with a remedy by distress, and as in *Worthington* v. *Wigley* (2), where, the demand being on a bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract." So that it would appear that, even if the lessor had received a bill on account of the rent, which he did not, it would not operate until met even as conditional payment of the rent.

Appeal allowed.

Solicitors for plaintiff : *Brandon & Nicholson.*
Solicitors for defendant : *Rose-Innes, Son & Crick.*

E. L.

1906

Oct. 26 ; *Nov.* 23.

HORTON *v.* COLWYN BAY AND COLWYN DISTRICT COUNCIL.

Compensation—Damage caused by exercise of Statutory Powers—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

The respondents, acting under the powers conferred by the Public Health Act, 1875, constructed an intercepting sewer, a pumping station, a sewage reservoir, and an outfall sewer, which were integral parts of, and together formed, one scheme of sewerage. The sewers were in part constructed on land the property of the claimant; the pumping station and the reservoir were constructed on land the property of other persons. The present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes:—

Held, that as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers" of the Public Health Act within the meaning of s. 308 of that Act, and consequently the claimant was not entitled to any compensation under that Act in respect of that depreciation.

CASE stated by an arbitrator.

On July 15, 1903, the respondents, being the local authority

(1) 2 A. & E. 623. (2) (1837) 3 Bing. N.C. 454.

for the urban district of Colwyn Bay and Colwyn, gave to William Horton, the claimant, a notice under s. 16 of the Public Health Act, 1875, that it appeared necessary for the effectual draining of their district that certain sewers should be carried through certain lands of the claimant shewn in the plan annexed to the notice, and that they would after July 29 carry the sewers through the said lands accordingly. Subsequently to the date of the notice the respondents, acting under the powers conferred by the Public Health Act, 1875, made and carried out a scheme of sewerage, which, so far as is material to this case, consisted of an intercepting sewer, a pumping station, a covered reservoir, and an outfall sewer. On March 31, 1904, the claimant gave notice to the respondents that he claimed a sum of 10,654*l.* as compensation for the damage and injurious affection which the said sewage works would cause to his property. The said claim was duly referred to arbitration, and on June 18, 1906, the arbitrator made his award in the form of a special case, which so far as is material was as follows:—

1. Colwyn Bay within the district of the respondents is a seaside watering place with a rapidly increasing population. In addition to Colwyn Bay there is an adjoining district called Llysfaen (not within the district of respondents) the sewage of which is conducted into the sewage system of Colwyn Bay. The sewage of Colwyn Bay will be conducted by numerous connections at different places into the respondents' intercepting sewer and will pass through the portions of that sewer which are situate in the claimant's lands and thence to the pumping station. The pumping station consists of a sump or covered receptacle, pumps and a covered reservoir. The sewage is received from the intercepting sewer into the sump, whence it is pumped to the covered reservoir which is at a higher level. From the reservoir it will flow by gravitation through the outfall sewer and be discharged into the sea. All the works at the pumping station and the outfall will be used solely for the purpose of disposing of the sewage received from the intercepting sewer passing as aforesaid through the claimant's land.

3. The intercepting sewer was constructed as to part of its length in and through land the property of the claimant, and as

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

to the remainder thereof in and through lands the property of other persons.

4. The outfall sewer was constructed as to part of its length in and through land the property of the claimant, and as to the remainder thereof in and through lands belonging to other persons.

5. The pumping station and covered reservoir were constructed upon land belonging to persons other than the claimant.

7. The claimant has suffered damage in respect of his lands, in and through which the said intercepting and outfall sewers are constructed, by the construction of the parts thereof which are within his said land to the extent of 871*l.* 10*s.* The respondents raised no objection to their legal liability to make compensation for damage under this head of claim if such damage was in fact caused, and the arbitrator awarded to the claimant in respect thereof the said sum of 871*l.* 10*s.*

9. The claimant has suffered damage in respect of a portion of his land and property by reason of the construction of the said pumping station and covered reservoir to the extent of 758*l.* 12*s.* 6*d.* The said damage is caused by the depreciation in present value of the said lands and property, and that depreciation is wholly due to the contemplated use of the said station and reservoir for sewage purposes. The arbitrator has not included any sum for such damages (if any) as may be hereafter recoverable by action for actual nuisance or negligence in the future user of the said works. The pumping station, reservoir, intercepting sewer and outfall sewer are integral parts of and form one scheme of sewerage.

The question for the Court is whether the claimant is entitled to recover the said sum of 758*l.* 12*s.* 6*d.* for the damage mentioned in par. 9.

Sir Robert Finlay, K.C., and *Marshall, K.C.*, for the claimant. As the depreciation in the value of the claimant's land is due to the construction of sewage works under the powers conferred by the Public Health Act, the claimant is entitled to recover the sum claimed by virtue of s. 308 of that Act, which provides that "Where any person sustains any damage by reason of the

exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers." Assuming that compensation can only be recovered under that section to the extent to which damages could be recovered in an action at common law, the damages here claimed could have been so recovered. But for the fact that the work was done under statutory powers the carrying of the sewers through the land of the claimant would have been wrongful. And in an action of trespass the plaintiff would not have been confined to the damage caused by the laying of the sewer pipes, but he would have also got damages in respect of such portions of his land as were injuriously affected by the presence of the pumping station, which never could have come into existence without the outfall sewer which passed through the claimant's land. The case is covered by *In re London, Tilbury & Southend Ry. Co. and Trustees of Gower's Walk Schools.* (1) There a railway company erected under their statutory powers a warehouse which had the effect of obstructing certain windows of the claimants, some of which windows were ancient and some new. The windows were in such a position that the one class could not be obstructed without the other. It was held that the claimants were entitled to compensation in respect of the whole of the windows, the new as well as the old. Lord Esher said: "In a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights." If the plaintiff in such a case were, instead of seeking damages, to ask for and obtain an injunction, that injunction would protect his modern as well as his ancient lights. And if so, then, if for some reason an injunction cannot be obtained, he ought to have a similar remedy in damages. But Lord Esher went on to decide that even if such damages could not be recovered in an action they could be recovered as compensation under s. 16 of the Railways Clauses Act, which provides that the company "shall make full satisfaction . . . . to all parties interested for all damage by them

(1) (1889) 24 Q. B. D. 326.

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

sustained by reason of the exercise of such powers." The language of that section is practically identical with that of s. 308 of the Public Health Act. In *Cowper-Essex* v. *Local Board for Acton* (1) the respondents constructed sewage works partly upon land of the appellant which they had taken compulsorily for the purpose under statutory powers incorporating the Lands Clauses Act. It was proved that the existence of sewage works, even though conducted so as not to create an actionable nuisance, depreciated the market value of neighbouring land for building purposes. It was held that, as part of the appellant's land had been taken, compensation might be awarded for damage to be sustained by the injuriously affecting of his other lands, not only by the construction of the sewage works, but by their use. That is precisely the present case; the language of s. 63 of the Lands Clauses Act, under which it was decided, being also practically identical with that of s. 308 of the Public Health Act. The only distinction between that case and the present is that there the claimant's land was taken for the purpose of the very sewage works which actually caused the depreciation of his other land, whereas here the pumping station and reservoir are not on the claimant's land. But the distinction is immaterial, for the case finds that the sewers and pumping station were integral parts of one scheme of sewerage. That scheme was in the nature of an organic whole, which cannot be split up into its constituent parts. If any essential part of the entire scheme was on the claimant's land, that is enough to entitle him to the compensation claimed. In *In re Bater and Birkenhead Corporation* (2) Lord Esher, speaking of s. 308 of the Public Health Act, said: "The words used are very wide, and it seems to me that they must include any pecuniary loss which a man suffers when he is not himself in default."

C. C. Hutchinson (*Macmorran, K.C.*, with him), for the respondents. To entitle a landowner to compensation for damage of the kind complained of here it is essential that the user by which he is damnified should be done on land taken from him for the purpose, and not on the land of other persons. The rule upon the subject as deducible from the authorities is thus stated by Lord Watson in *Cowper-Essex*

(1) (1889) 14 App. Cas. 153. (2) [1893] 2 Q. B. 77.

v. *Local Board for Acton* (1) : "A proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers." In *In re the Stockport, Timperley and Altringham Ry. Co.* (2) the railway company took some land of a cotton-mill proprietor and proposed to make their railway on it so close to the mill as to depreciate its value and to render it insurable only at an increased premium. It was held that the millowner was entitled to compensation in respect of the mill being injuriously affected by the use of the railway. There the injurious acts were to be done on the land taken. Crompton J. pointed out that where the damage is occasioned by what is done upon other land which the company have purchased and such damage would not have been actionable at common law, no compensation is obtainable therefor; "where however the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, It is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage." In *Caledonian Ry. Co.* v. *Ogilvy* (3) a railway was made to cross the approach to a gentleman's lodge on the level, whereby access from his house to the high road was prevented without constant liability to interruption and delay owing to the closing of the gates at the level crossing, and danger to persons passing from the house to the high road. The site of the level crossing was not on the claimant's land, though other portions of the railway passed through his property. It was held that he was not entitled to compensation for deterioration of the amenity and value of the house as a residence by reason of the level crossing. In *City of Glasgow Union Ry. Co.* v. *Hunter* (4) the railway company compulsorily took a portion of the back part of the respondent's property for the purposes of their railway, and they also built a bridge across a street immediately in front of his property, whereby his houses fronting to the street were depreciated in value by reason of the noise and smoke of the trains passing

(1) 14 App. Cas. 153.
(2) (1864) 33 L. J. (Q.B.) 251.
(3) (1856) 2 Macq. 229.
(4) (1870) L. R. 2 H. L. Sc. 78.

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

over the bridge. The bridge was built upon the land of another person, and the front portion of the respondent's property was not otherwise connected with the portion taken than by their being both held under the same title. It was held that as the annoyance which caused the depreciation was the result of acts done on land not taken from the respondent, he was not entitled to compensation in respect of it, notwithstanding that other land of his was taken. That case affords a sufficient answer to the claimant's contention in the present case that the sewerage scheme was one indivisible whole. For there the bridge and the part taken were integral parts of the entire railway scheme; the bridge would have been useless without the railway. But that fact did not avail the claimant. Moreover, here the position of the sewers in the claimant's land is not the cause of the pumping station being where it is. It was placed there because it was convenient to the council. The sewers might have taken a different direction.

Marshall, K.C., in reply.

Cur. adv. vult.

Nov. 13. BIGHAM J. read the following judgment:—The question which I have to determine is whether the claimant is entitled to be paid the sum of 758*l.* 12*s.* 6*d.* mentioned in par. 9 of the case. This sum is the ascertained depreciation of the present value of the claimant's land and property due to the contemplated user by the respondents of a pumping station and reservoir which they have erected on their own land for sewage purposes. The answer to this question depends upon the construction to be put on s. 308 of the Public Health Act, 1875, which provides as follows: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers."

The facts are fully set out in the case prepared by the arbitrator; but I may recapitulate such of them as relate directly to the point before me. The pumping station and reservoir have not been built upon land taken from the

claimant—they are built on land owned by the respondents themselves; but these buildings and the sewers, which the respondents have laid under the claimant's lands, connected together form one scheme of sewerage. The 758*l.* 12*s.* 6*d.* does not cover damages which may be caused to the claimant by nuisance or other legal tort arising out of the user of the buildings in question. In case such damages should arise the claimant will be in a position to claim them by an action at law whether he is now paid the 758*l.* 12*s.* 6*d.* or not.

It follows from these facts that the respondents have not committed any common law tort by the mere erection of the buildings themselves as distinct from the sewers. They have done no more than erect on their own land buildings which they were entitled to put there, and which they may keep there until, if ever, they become an actionable nuisance. A man may use his own land in whatever way he pleases, with this single limitation, that he must not by the user violate any of his neighbours' legal rights. Thus he may put on his land a racecourse, a graveyard, a slaughter-house, or a prison, and his neighbours cannot complain. Such things may cause very real depreciation to the value of his neighbour's land, but as they constitute no actionable loss the sufferer must submit to the misfortune. But a man may not use his own land for a purpose which creates a nuisance by noise or smell, nor may he put up buildings which obstruct his neighbour's ancient lights. In such cases he violates the right of his neighbour to the lawful enjoyment of his property, and makes himself liable to an action for damages or for an injunction, as the case may be. Orderly crowds, mourning coaches, butchers' carts, and prison vans passing my door are incidents of life which I must endure; but it is different if a man, by a noisy or an offensive business or by casting gloomy shadows, seriously invades the actual physical enjoyment of my land. Therefore this sum of 758*l.* 12*s.* 6*d.* could not be recovered from the respondents in an action at common law if the claim to it was based on the mere fact of the erection by the respondents of the pumping station and reservoir on their own land. Does it, then, make any difference that these buildings are connected with the sewers laid under the claimant's land so as to constitute

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

Bigham J.

one system of sewerage? I think it does not. No doubt, but for the protection given by the Act of Parliament to the respondents, the laying by them of the pipes under the claimant's land would amount to a trespass, for which damages at common law would be recoverable, but the question is whether in estimating such damages the depreciation caused by the anticipated user of the station and reservoir ought to be taken into account. Sir Robert Finlay says it ought, and he contends (quite properly) that if so it also comes within the meaning of the compensation clause in the Public Health Act. But I am of opinion that such damages could not be recovered in a common law action. The arbitrator has dealt with the damage caused to the claimant's land by the trespass mentioned, and has awarded him in respect thereof the sum of 871*l.* 10*s.* Why should these damages be increased by additional compensation for acts done on land which is not and never was the claimant's, and which, if those acts stood alone, would have afforded him no ground at all for complaint? The mere circumstance that the pipes are brought into physical connection with the reservoir seems to me to be quite immaterial, nor can it matter that the connection has had the effect of forming one system of sewerage. The trespass by the laying of the pipes is the only legal wrong done, and for that the 871*l.* 10*s.* is awarded as sufficient.

But it is said that the case is covered by the authority of *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools.* (1) There the public authority by works constructed under their statutory powers had obscured some ancient lights belonging to the claimants, and in doing so they had necessarily obscured some modern lights in respect of which no easement had been acquired. Lord Esher held that at common law the loss caused by the obstruction of the modern lights would be recoverable, and was therefore a proper subject for compensation under the statute. He says (2): "Supposing the company had been in the ordinary position of owners of land and not affected by any statute, and had then done what they have done, the trustees would have been entitled to sue them in a common law action for interference with ancient lights, could

(1) 24 Q. B. D. 326. (2) 24 Q. B. D. at p. 329.

the plaintiffs in such an action have recovered damages in respect of injury to all the lights affected, the new as well as the old? On this point the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights. If so, it seems to me obvious that compensation must be given under the statute to the same extent." The reason there given is that the additional damage caused by the obstruction of the modern lights was a necessary consequence of the actionable tort committed by the obstruction of the ancient lights. Lord Esher held that the casting of the shadow over the new lights was something done which depreciated the value of the claimants' land, and as it was done by an act wrongful at common law, it ought to be taken into account in assessing the damages. I think both the reasoning and the conclusion derived from it might be criticized, for I observe that Mr. Bosanquet, in his argument in the Court below on behalf of the claimants, conceded that they could not have recovered for the new lights in a common law action. It is not, however, for me to criticize. It is sufficient to say that in my opinion the reasoning does not apply to the facts of the present case. The erection of the reservoir is not a necessary consequence of the laying of the sewers, nor is it anything which physically affects the claimant's land at all. But Lord Esher went further, and considered the case not merely with reference to the rights as they would exist at common law, but also as they did exist under the wording of the statute. Lindley and Lopes L.JJ. and the two learned judges

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

Bigham J.

in the Court below, Mathew and Wills JJ., considered the case only in this connection, and they all held that the depreciation caused by obscuring the modern lights came within the meaning of the words of the statute then under consideration, which were "full satisfaction . . . . for all damage . . . . sustained by reason of the exercise of such powers," and must therefore be taken into account. For the purpose in hand the statute in the *Tilbury Case* (1) and the statute in the present case may be taken as identical. On what ground, then, were the damages caused by the obstruction of the modern lights, in respect of which no easement existed, given? Lord Esher gives them in deference to authority. He says (2): "The question is whether on the true construction of these words, where something is done in pursuance of the powers of the Act, there is given to the person against whom the powers are put in force something more than the legal damage which could have been recovered in an action. If the words 'full' and 'all' were omitted from the section, and it ran thus, 'the company shall make satisfaction to all parties interested for damage by them sustained by reason of the exercise of such powers,' that would cover legal damage, so it may be said, that, if the statute only gives actionable damage, those words are tautology. But for superior authority, I myself should have been inclined to say that, unless an Act says so in most clear and distinct terms, it should not be held to give more than legal damages and that those words did not carry the case further. But in *Cowper-Essex* v. *Local Board for Acton* (3), in which I think I expressed this view, an appeal was taken from this Court to the House of Lords. In that case some land had been taken, and by what was done on that land other land was injuriously affected. In such a case the House of Lords have said, as I understand, that more can be recovered as compensation than as legal damage in an action. I confess I can only find one phrase from which I can get a clear apprehension of what the House meant, and that is in the judgment of the Lord Chancellor, at p. 161. He says: 'Where part of a proprietor's land is taken from him, and the

(1) 24 Q. B. D. 326. (2) 24 Q. B. D. at p. 330.
(3) 14 App. Cas. 153.

future use of the part taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.' That seems to me to shew that under the statute there may be an injurious affecting, for the purpose of compensation by something which would not be the subject of an action at common law; because it is obvious that the user of the land in the way there suggested would not if it did not amount to a nuisance, have given a cause of action." But for authority Lord Esher apparently would have excluded the damages if they were of a kind not recoverable at common law. The other judges, however, take a wider view of the words used by the Legislature, and in effect they say that wherever the statutory powers are used so as to give rise to a claim the claimant is entitled to be paid for all the damage he may sustain by the exercise of the powers, whether it be damage which would be recoverable at common law against a wrong-doer or not. The question, therefore, in the present case is whether the depreciation in the value of the claimant's land arising from the proximity of the pumping station and reservoir is damage due to the exercise of the statutory powers. Now I think it is clear that the exercise of the statutory powers referred to and contemplated by the learned judges in the *Tilbury Case* (1) consists of something done on the land taken from the claimant by the public body, or on land held by him. Such an exercise of the statutory powers alone concerns him. The statutory powers exercised elsewhere, though they may depreciate the value of his property, cannot in my opinion be relied upon for the purpose of increasing the compensation recoverable. To give an illustration, suppose in the present case that all that the public authority had done was to take part of the claimant's land for the purpose of erecting upon it a workman's dwelling; this I am satisfied would have given no right to the compensation now asked for. I know of no case where damages have been given in respect of depreciation unless such depreciation was due to something done under

(1) 24 Q. B. D. 326.

1906

HORTON v. COLWYN BAY AND COLWYN DISTRICT COUNCIL.

Bigham J.

cover of the statute over or upon land of the claimant or on land which had been taken from him. There is no case where damages have been awarded in respect of depreciation due to the exercise of the statutory powers on the undertakers' own land.

Since this case was argued before me my attention has been drawn to a decision of Darling and Phillimore JJ. in *Rex* v. *Mountford, Ex parte London United Tramways, Ld.* (1) In that case the tramway company, acting under its statutory powers, had taken part of Mountford's land in order to widen a street through which their tram line was to be laid. The land so taken was thrown into and became part of the street, but the tram line was not laid thereon. The tram line was placed on the land of the old street. Mountford was awarded compensation for the value of his land taken, and also compensation for depreciation of his remaining property by reason of the land taken being used as part of the street. He claimed, however, compensation for depreciation caused by the running of the trams along the old part of the street. It was held that he was not entitled to such compensation. Darling J. gives as his reason that the claimant, having received compensation for the land taken from him, and also for the depreciation of his other land by reason of the part taken being used as a public highway, had received all to which he was entitled, and that the statutory user of the old highway, which had never formed part of the claimant's property, could not be called in aid to swell his claim. This case appears to me to be in point. It is true that there was no physical connection between the tram line and Mountford's property as there is in the present case, by means of the sewers between Mr. Horton's property and the reservoir, but that distinction seems to me to be immaterial.

Judgment for the respondents.

Solicitors for claimant: *Cunliffes & Davenport, for Chamberlain & Johnson, Llandudno.*

Solicitors for respondents: *Sharpe, Parker, Pritchards & Co., for Porter, Amphlett & Jones, Colwyn Bay.*

(1) [1906] 2 K. B. 814.

J. F. C.

NORTH MANCHESTER OVERSEERS *v.* WINSTANLEY.

1906

Oct. 26; Nov. 5.

Rates—Burial ground separated from Church—Churchyard—Liability to Poor Rate—Premises "exclusively appropriated to Religious Worship"—Poor Rate Exemption Act, 1833 (3 & 4 *Will.* 4, *c.* 30).

The old churchyard of a parish church was closed under an order made under the Acts relating to overcrowded burial grounds, and two sites contiguous to each other, but at a distance of 300 yards from the church, were acquired by the Ecclesiastical Commissioners or their predecessors under the Church Building Acts. The sites were consecrated for interment according to the rites of the Church of England and thereafter constituted the burial ground used in connection with the church. There was a fixed fee for the performance of burials and a scale of charges for the purchase of graves in the burial ground. These included charges for the purchase of freehold graves, the reopening of graves, for single interments in public graves, for placing memorials, for planting, painting, and other matters; and the net income derived therefrom was received by the rector of the parish and retained by him to his own use:—

Held, that the burial ground was to be treated, not as a cemetery which has its occupiers and is a rateable hereditament, but as a parish churchyard in respect of which the rector was not rateable, inasmuch as, although the parish churchyard is the freehold of the parson and he is entitled to such rights as cutting the grass growing in it and to customary fees for burials, he has never been held to be in occupation of it so as to make him liable to the poor rate as a beneficial occupier. This principle must extend to additional spaces of ground acquired by gift or purchase and annexed to original ancient churchyards which have become full. It also extends to similar spaces which, although acquired and added to the original churchyard, are not immediately contiguous to it.

Case stated by the Recorder of the City of Manchester.

The respondent, the Rev. J. A. Winstanley, was assessed by the appellants, the overseers of the poor of the township of North Manchester, to a rate for the relief of the poor of the township of North Manchester, as the occupier of certain hereditaments described in the rate as cemetery buildings and other hereditaments not being agricultural land, in the sum of 83*l.* 10*s.* as the rateable value thereof. The respondent appealed to quarter sessions against the rate on the ground that the land and hereditaments in respect of which he was so rated were conveyed to the Ecclesiastical Commissioners for England or their predecessors

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY.

for the purposes of, and were used as, an additional burial ground to All Saints' Church in the said township, and as such were wholly exempt from rating. The appeal came on for hearing before the Recorder of Manchester, who allowed the appeal subject to the opinion of the King's Bench Division upon the following case.

The respondent at the date of the laying of the rate was the rector and incumbent of All Saints' Church, situate in the district of Newton Heath, in the township of North Manchester. The old churchyard of All Saints' Church was closed in the year 1854 under an order made under the Acts relating to overcrowded burial grounds.

By deed dated March 7, 1855, the Dean and Canons of Manchester, and as such the owners in fee of the hereditaments thereinafter described under the authority and for the purposes of the Church Building Acts, 1818 (58 Geo. 3, c. 45), 1819 (59 Geo. 3, c. 134), and 1822 (3 Geo. 4, c. 72), conveyed unto Her Majesty's Commissioners for building new churches a piece of ground situate at Newton Heath, in the parish of Manchester, and containing in the whole two acres or thereabouts, for the purpose of the said several Acts and to be devoted and consecrated to ecclesiastical purposes for ever. The conveyance was duly accepted by Her late Majesty's Commissioners for building new churches, and the piece of ground, having been enclosed with a good and sufficient fence and proper gates and put in every respect in a fit and proper state for consecration, was on March 22, 1855, consecrated by the Bishop of Manchester as an additional burial ground or cemetery for the interment of the dead of the parish of All Saints', Newton Heath, according to the rites and ceremonies of the Church of England, and the bishop by the sentence of consecration directed, decreed, and declared that the piece of ground should from thenceforth remain separate and set apart from all common and profane uses whatsoever.

By a further deed, dated June 5, 1883, the Dean and Canons of Manchester, under the authority and for the purposes of the Church Building Acts, 1818, 1819, 1822, 1838 (1 & 2 Vict. c. 107), 1845 (8 & 9 Vict. c. 70), 1851 (14 & 15 Vict. c. 97), and the Church

Building Commissioners (Transfer of Powers) Act, 1856 (19 & 20 Vict. c. 55), conveyed unto the Ecclesiastical Commissioners for England and their successors a certain other piece of land, containing 7669 square yards, adjacent to the burial ground of the parish of All Saints', Newton Heath, so consecrated, as above mentioned, for the purposes of the said Acts, and to be appropriated as and for an addition to the burial ground of the parish of All Saints', Newton Heath, and to be devoted, when consecrated, to ecclesiastical purposes for ever. The conveyance was duly accepted by the Ecclesiastical Commissioners, and the additional piece of land was on November 3, 1883, duly consecrated by the Bishop of Manchester as an addition to the burial ground or cemetery for the interment of the dead of the parish of All Saints', Newton Heath. The cost of fencing in the two plots of land was ultimately defrayed by the Rev. E. F. Letts, the incumbent for the time being of the living of All Saints', Newton Heath, out of his own pocket.

The two plots of ground so consecrated were contiguous to each other, and were distant about 300 yards from the church of All Saints', and were generally known as and were called "the Newton Heath Cemetery," and were the hereditaments in respect of which the respondent was rated, but there were no buildings on the plots of land for the purposes of conducting religious services in connection with the burial of the dead. In all cases the religious service was commenced at the church of All Saints' and the body afterwards conveyed to the burial ground for final interment.

The fee for the performance of burials in the burial ground as established and fixed under the Parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41), was 2*s.* for each burial. In 1886 the Rev. E. F. Letts, who was then the rector and incumbent of the parish of All Saints', and certain parishioners of All Saints', acting as the cemetery committee of the new burial ground, drew up and issued to the public a statement of the scale of charges for the purchase of graves in the burial ground, and of rules and regulations for the care and management thereof. It was admitted that similar charges were made for the purchase of graves in some churchyards in the district

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY.

where the churchyard formed part of the land which was the site of the church, and the incumbents, though receiving the same, had not been rated in respect thereof. At the date of the laying of the rate appealed against, the like scale of charges was made by the respondent in respect of interments in the said burial ground or cemetery, and, in addition thereto, a further charge was made to meet the proportion of poor rate payable in respect of the burial ground or cemetery, and it was proved or admitted that the gross receipts received by the respondent from the purchase of graves in the burial ground and other charges connected with the interment of the dead, including the fees of the respondent, the clerk, and the sexton, for the performance of burials there for the year next preceding the date of the laying of the rate, amounted to the sum of 210*l.* 16*s.*, whilst the expenses of the maintenance of the burial ground and for wages, repairs, and other outgoings connected with the same, amounted to the sum of 110*l.* 8*s.* 10*d.*, leaving a net profit of 100*l.* 7*s.* 2*d.*, which the respondent received and retained to his own use. From this sum of 100*l.* 7*s.* 2*d.* the appellants deducted one-sixth, and so arrived at the rateable value of 83*l.* 10*s.*, as entered in the rate appealed against.

Upon the above facts it was contended on behalf of the respondent that he was not liable to be rated, upon the ground that by the sentence of consecration the burial ground was a site consecrated to public worship according to the rites of the United Church of England and Ireland as by law established, by reason of the provision of s. 33 of the Church Building Act, 1818 (1), and was a place exclusively appropriated to public

(1) Church Building Act, 1818, s. 33: "It shall be lawful for the said Commissioners to accept and take any building or buildings fit to be used for or to be converted into such additional churches or chapels, and also any lands, tenements and hereditaments proper for sites of additional churches or chapels, not exceeding in quantity in any one place what may be sufficient for building of a church or chapel, providing a churchyard, and making a proper and sufficient access or approach thereto, from any persons willing to give the same; and every such site, when conveyed to the said Commissioners, and the church erected thereupon, and notice thereof given to the bishop of the diocese, shall become for ever thereafter devoted to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public

religious worship within the meaning of the Poor Rate Exemption Act, 1833. (1)

It was contended on behalf of the appellants (1.) that the burial ground or cemetery formed no part of the site of All Saints' Church within the meaning of s. 33 of the Church Building Act, 1818, and was not in any case a place exclusively appropriated to public religious worship within the meaning of s. 1 of the Poor Rate Exemption Act, 1833; (2.) that the respondent was the occupier of the whole cemetery, and derived annual profits therefrom, and was, therefore, liable to be assessed upon the whole of

---

worship according to the rites of the United Church of England and Ireland, as by law established."

Church Building Act, 1845, s. 13: "In all cases the freehold of the site of every church of which Her Majesty's said Commissioners may have accepted or shall accept a conveyance under the provisions of the hereinbefore recited Acts or any of them (as to any church not yet consecrated, when the same shall be consecrated,) shall vest in the incumbent for the time being of such church; and the freehold of every burial ground of which the said Commissioners may have accepted or shall accept a conveyance under the provisions of the hereinbefore recited Acts or any of them shall, after the same shall have been consecrated, vest in the incumbent for the time being of the church to which such burial ground shall belong, or if there shall be no such incumbent, then in such body or person as the said Commissioners may, with consent of the bishop of the diocese, in such special case direct, until there shall be an incumbent, and from and after that time then in such incumbent, for the use of the inhabitants of the place for which such burial ground was acquired."

(1) Poor Rate Exemption Act, 1833: "Whereas it is expedient that churches, chapels, and other places exclusively appropriated to public religious worship should be exempt from the payment of poor and church rates: . . . . no person or persons shall be rated or shall be liable to be rated, or to pay to any church or poor rates or cesses, for or in respect of any churches, district churches, chapels, meeting houses, or premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the Established Church) shall be duly certified for performance of such religious worship according to the provision of any Act or Acts now in force: Provided always, that no person or persons shall be hereby exempted from any such rates or cesses for or in respect of any parts of such churches, district churches, chapels, meeting houses, or other premises which are not so exclusively appropriated, and from which parts not so exclusively appropriated such person or persons shall receive any rent or rents, or shall derive profit or advantage."

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY.

such profits according to the decision in *Reg.* v. *St. Mary Abbotts, Kensington (Inhabitants of)* (1), and *Reg.* v. *Abney Park Cemetery Co.* (2) The recorder held that the cemetery or burial ground, buildings, and hereditaments were exempt from rating under the provisions of the Act of 1833.

The question for the opinion of the Court was whether the recorder was correct in holding that the said hereditaments were exempt from rating under the Act of 1833.

E. Sutton and *Gordon Hewart*, for the appellants. The respondent derived a profit or advantage from the burial ground, and it was therefore not exclusively appropriated to public religious worship. He derived a profit or advantage from the sale of graves. It is extremely doubtful whether the Burial Service is "religious worship." The purchase and sale of a grave is not part of public religious worship, and therefore the graveyard is not exclusively devoted to public religious worship. The graveyard is a cemetery. If this graveyard is exclusively devoted to public religious worship, it follows that what may be called a commercial cemetery is also so appropriated. Consecration has nothing to do with rating or public religious matters. By public religious worship is meant attending church and paying devotions to the Deity: case of the *Oxford Poor Rate* (3); *Reg.* v. *St. Mary Abbotts, Kensington (Inhabitants of)* (1); *Reg.* v. *Abney Park Cemetery Co.* (2) The parson has such a property in the churchyard as prevents it being exclusively devoted to religious purposes. He can let it, and the lessee can use it for purposes other than religious purposes: 2 Rolle's Abridgement (1668 ed.), 307. It is for the respondent to shew that he comes within the exemption from rateability contained in the Poor Rate Exemption Act, 1833.

Macmorran, K.C., and *G. Rhodes*, for the respondent. This burial ground is a churchyard, and is therefore not rateable. A churchyard is a burial ground about a church. A church is not rateable: *Wright* v. *Ingle.* (4) In that case the Court pointed out the distinction between a church and a chapel. The Poor Rate

(1) (1840) 12 A. & E. 824.
(2) (1873) L. R. 8 Q. B. 515.
(3) (1857) 8 E. & B. 184.
(4) (1885) 16 Q. B. D. 379.

Exemption Act, 1833, was passed to place churches on the same footing as chapels. The exemption from rating which applies to churches extends to churchyards. There is no authority in support of the proposition that a churchyard properly so called has ever been or can be rated. No doubt when pew rents were charged the church might have been rateable, and that is probably the reason why the church was included in the Act of 1833. The churchyard is an appendage of the church. The right to take fees in a church does not make the occupation beneficial in the proper sense. In *Robson* v. *Hyde* (1) a private building was under consideration. Cemeteries like Abney Park are generally made under a private Act, and are made for profit. Such cemeteries are quite different from a churchyard. Under the Burial Acts the incumbent receives fees, but he is not the occupier of the burial ground. The effect of the Burial Acts is to make the ground newly consecrated a part of the parish churchyard. The right of the incumbent to take any fees must be a customary right. If the argument on behalf of the appellants were sound it would follow that all churchyards would be rateable where the incumbent takes the customary fees. *In re Bateman* (*Baroness*) *and Parker's Contract* (2) shews that land may be part of a churchyard although physically separated from it and adjoining the highway.

[*Wolfe* v. *Surrey County Council* (*Clerk of*) (3), and the Church Building Act, 1818, were also referred to.]

Sutton, in reply. A rector can be, and is in fact, in exclusive occupation of the churchyard. Some person must be in occupation of land. If the clergyman is not in occupation it is difficult to see who is. It is clear that the parson can grant a lease. *Greenslade* v. *Darby* (4) shews that the rector is as much in occupation as an ordinary occupier of land. It is true that as a general rule the rector cannot derive a profit from the churchyard, but if he could he would be rateable as occupier. The rector is owner of the freehold of the churchyard, and the ownership gives him the exclusive occupation. By common law graves cannot be sold, and on payment of the customary fees

(1) (1783) Cald. 310.
(2) [1899] W. N. 30.
(3) [1905] 1 K. B. 439.
(4) (1868) L. R. 3 Q. B. 421.

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY.

any person is entitled to require the interment of a body: Burn's Ecclesiastical Law.

[LORD ALVERSTONE C.J. We do not intend to decide the question whether the rector could not be an occupier.]

A graveyard separated from a churchyard by a considerable portion of land cannot be said to be a part of the churchyard: case of the *Oxford Poor Rate*. (1) The sale of graves is not a necessary part of, nor is it in any way connected with, public religious worship; if it were, s. 15 of the Burial Act, 1855 (18 & 19 Vict. c. 128), would not have been required. That section was enacted because, in its absence, the land sold might have become rateable at a higher rate. In *Reg.* v. *Abney Park Cemetery Co.* (2) the land was held to be rateable although the church was consecrated for public worship. The fact that profit is made by the sale of graves prevents the land being exclusively appropriated to public religious worship. Where graves are sold the land itself is dealt with, and a profit is made by the sale of land. A vault might be purchased and never used for the purposes of burial. Therefore a rector in selling it is granting an easement which he could not ordinarily grant without a faculty.

Cur. adv. vult.

Nov. 5. The following judgment of the Court (Lord Alverstone C.J., Ridley and Darling JJ.) was read by:—

RIDLEY J. In this case the question is whether the respondent, the rector of All Saints', Manchester, is rateable to the poor in respect of an additional burial ground acquired under the Church Building Acts. It appears that the old churchyard of All Saints' Church was closed in 1854, and that in 1855 and in 1883 two sites contiguous to each other were acquired under those Acts, and now constitute the burial ground used in connection with All Saints', although at a distance of three hundred yards from the church. The fee for the performance of burials has been fixed at 2*s.*, under the Parish of Manchester Division Act, 1850, and in 1886 there was drawn up and used by the then incumbent of the parish and a committee of parishioners

(1) 8 E. & B. 184. (2) L. R. 8 Q. B. 515.

a scale of charges for the purchase of graves in the burial ground. These included charges for the purchase of freehold graves, for the reopening of graves, for single interments in public graves, for placing memorials, for planting, painting, and other matters; and it is found in the case that in the year 1904 the receipts from these sources all included came to the gross sum of 210*l.* 16*s.* and to the net sum of 100*l.* 7*s.* 2*d.*, which was received by the respondent and retained by him to his own use. The appellants had rated the respondent as the occupier of the burial ground at the rateable value of 83*l.* 10*s.*—that is, on the before stated sum of 100*l.* 7*s.* 2*d.*, less one-sixth; and the respondent appealed against such rate to the quarter sessions for the city of Manchester, on the ground that the burial ground in question was used as an additional burial ground to All Saints' Church and was therefore exempt from rating. On the appeal coming on for hearing the appellants contended that the burial ground was not exclusively appropriated to public religious worship within the meaning of the Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30); and, secondly, that the respondent was the occupier of the whole cemetery, and derived annual profits therefrom, and was liable to be assessed upon them according to the decisions in *Reg.* v. *St. Mary Abbotts, Kensington* (*Inhabitants of*) (1), and *Reg.* v. *Abney Park Cemetery Co.* (2) The recorder held that the burial ground or cemetery was exempt from rating under the Poor Rate Exemption Act, 1833, and allowed the appeal, subject to the case stated for our opinion. With regard to the Act of 1833 (3 & 4 Will. 4, c. 30), which, it was contended, relieved the burial ground from rateability as a place "exclusively appropriated to public religious worship," we think that there can be no doubt, having regard to the character of some portion of the Burial Service which is conducted at the place of interment (e.g., the prayer), that the burial ground would be a place so used, though it would be doubtful if it could be said to be exclusively devoted to such purpose. But we have considerable doubt whether, looking at the words "churches, district churches, chapels, meeting houses, or premises, or such part

(1) 12 A. & E. 824. (2) L. R. 8 Q. B. 515.

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY.

thereof as shall be exclusively appropriated to public religious worship," it has any operation except upon buildings used for religious worship. It must be remembered that the statute, although it purports to relieve all churches, chapels, &c., from rateability, was in reality passed to extend to the latter the immunity already enjoyed by the former. It might be said, indeed, that "premises" is a word large enough in its full meaning to include churchyards; but in our opinion it should in this passage be read as a phrase ejusdem generis with "churches and chapels." But however that may be, as far as we know, no parish churchyard has ever been held rateable to the poor rate, and the question we have to decide depends on whether this burial ground is to be classed with the parish churchyards on the one hand, or on the other with the cemeteries which were the subject of the decisions quoted for the appellants. The parish churchyard is the freehold of the parson; and although he is entitled to such rights as that of cutting the grass growing in it, and to customary fees for burials, he has never been held to be in occupation of it so as to make him liable to the poor rate as a beneficial occupier. We think this principle must extend to additional spaces of ground acquired by gift or purchase and annexed to original ancient churchyards which have become full. It would also, we think, certainly extend to similar spaces which, although acquired and added to the original churchyard, are not immediately contiguous to it; and therefore it would include this burial ground, unless there is anything in the Church Building Acts to place such additional burial grounds in a different position. But we can find no provision of that kind in those Acts. By s. 33 of the Church Building Act, 1818 (58 Geo. 3, c. 45), the Commissioners for building new churches may accept and take lands, tenements, and hereditaments proper for sites of additional churches and chapels and providing a churchyard, and every such site when conveyed to the Commissioners becomes devoted for ever thereafter to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public worship according to the rites of the Church of England. And by s. 13 of the Church Building Act, 1845 (8 & 9 Vict. c. 70), it is enacted

that the freehold of every church and burial ground so conveyed shall vest in the incumbent for the use of the inhabitants of the place for which such burial ground is acquired. It does not appear to us that the burial grounds acquired under these enactments are for the purposes of rateability in any different position from an ordinary parish churchyard, nor that the parson is constituted a rateable occupier of them. But it was argued before us that the taking of fees by the vicar for the grant of places of interment and for the performance of burial services makes the burial ground rateable. In the first place customary fees have always been taken by the parson for these services without rendering the churchyard rateable. The reason is, in our opinion, not that such fees are customary, but that the receipt of them does not make the parson the beneficial occupier of a hereditament within the Acts relating to the poor rate. His relation to the churchyard is the same whether he takes fees or not; and the fees themselves cannot be the subject of a rate. This reasoning seems to us to apply to the fees taken in the present instance. We proceed to examine the analogous case of pew rents which have been discussed in previous decisions of the Courts. In *Robson* v. *Hyde* (1) the question was raised whether a room let on lease to trustees and used for services of the Church of England was rateable; and it was held that it was so, because it was a mere private room let out at the time for the purposes of religious worship, but which could be applied to any other use at the pleasure of the owner. The decision itself is not in point here; but in the judgment given by Buller J. there occur these words: "His" (the minister's) "case does not resemble that of a clergyman. But if it did, I am very far from being satisfied that a member of the Established Church, a parson or vicar, who has the profits of the pews given him by the parish in increase of his benefice, is not rateable for such profits." If that were the true view and profits obtained from pews were rateable, so might the profits obtained from burials in the churchyard be rateable, although even then a distinction might be drawn between the rent issuing from a pew and the

(1) Cald. 310.

1906

NORTH MANCHESTER OVERSEERS v. WINSTANLEY

fees accruing partly for religious services rendered and partly for the grant of places of interment. But the words of Buller J. were quoted and discussed by this Court in the case of *Wolfe* v. *Surrey County Council* (*Clerk of*) (1), and it was there pointed out in the judgment that they do not express a confident opinion, and that the learned judge may have meant to suggest that if such pew rents are to be regarded as additional to the tithes for which a parson is admittedly rateable, the amount for which he is rated ought to be correspondingly increased. The observations made by the Court in the case of *Beswick* v. *Alker* (2) tend still more strongly in the same direction. In that case the question was whether a parson who had claimed a freehold vote for a county for "freehold land and pew rents," and who was in receipt of such pew rents by way of stipend, was to be regarded as in occupation of such pew rents, so as to be disqualified for the county vote under s. 24 of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45). The Court decided this in the negative, and the judgments given appear to be very apt to the decision of this case. They did not proceed merely on the ground that pew rents are not land or building within the meaning of the section in the Act of 1832, but also on the ground that the parson had no occupation either of the pews or of the pew rents. Bovill C.J. says (quoting from the report in the *Law Journal*): "It has been contended that he was in occupation of the pews themselves which were on the land, but there is no such statement of this in the case; on the contrary, it would seem that the pews were in the possession of those who rented them or of the churchwardens." Grove J. said: "I cannot see how it can be said that the respondent occupies pew rents." We agree with this decision and the reasoning on which it proceeded. Nor do we think that any real distinction can be drawn between the occupation required by s. 24 of the Act of 1832 and that required to make a person rateable. That point was left open in the judgment given in the case of *Wolfe* v. *Surrey County Council* (*Clerk of*) (1), as it was not necessary to decide it. But if the parson does not occupy either church or pews or pew rents, and does not occupy the churchyard, how can he be said

(1) [1905] 1 K. B. 439. (2) (1872) L. R. 8 C. P. 265; 42 L. J. (C.P.) 26.

to occupy either the places for interment or the fees paid in respect thereof? At the hearing before the recorder and on the argument before us the appellants relied on the decisions of the Court relating to cemeteries—namely, *Reg.* v. *St. Mary Abbotts, Kensington* (*Inhabitants of*) (1), and *Reg.* v. *Abney Park Cemetery Co.* (2) But we think that those cases proceeded on a different ground, and have no bearing on the question whether a parish churchyard is rateable or on the status of the parson in connection therewith. In each of them a company had been formed which purchased the land in question and laid it out as a cemetery, erected buildings and vaults, and carried on the business of a burial company for profit in connection with the cemetery. They also sold plots for graves under conveyances by which the purchaser was to hold the plots as trustee for the trustees and directors of the company. The Court held the company occupiers of the whole cemetery and rateable in respect thereof. But it does not seem to have been thought that there was any analogy between such cemeteries and a burial ground or parish churchyard, such as that which is the subject of this case; and if, as we think is the case, this burial ground is to be treated, not as such a cemetery which has its occupiers and is a rateable hereditament, but as a parish churchyard, it appears to us not to be rateable. For these reasons we think that the decision of the recorder was right and ought to be affirmed.

Appeal dismissed.

Solicitors for appellants: *Chester, Broome & Griffithes, for Crofton, Craven & Worthington, Manchester.*

Solicitors for respondent: *Rooke & Sons, for Orford & Sons, Manchester.*

(1) 12 A. & E. 824. (2) L. R. 8 Q. B. 515.

J. E. A.

1906

Oct. 25.

DU CROS, APPELLANT *v.* LAMBOURNE, RESPONDENT.

Justices — Offence punishable upon Summary Conviction — Information — Principal Offender—Conviction for Aiding and Abetting—Evidence — Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 1.

A person who has aided and abetted the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed the offence as principal offender.

Benford v. *Sims*, [1898] 2 Q. B. 641, followed.

The appellant appealed to quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car. The quarter sessions, without deciding whether the appellant was himself driving the car, dismissed the appeal, finding as facts that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could, and ought to, have prevented it:—

Held, affirming the decision of quarter sessions, that there was evidence on which the appellant could be convicted of aiding and abetting the commission of the offence.

CASE stated by the Warwickshire Quarter Sessions on an appeal by the appellant, Du Cros, against a conviction for unlawfully driving a motor car at a speed dangerous to the public, having regard to all the circumstances of the case. The quarter sessions dismissed the appeal and affirmed the conviction, subject to this case.

The facts stated in the case were as follows: The appellant was the registered owner of a powerful Mercedes motor car, No. A 1977, and was duly licensed to drive a motor car. On July 13, 1905, the motor car (No. A 1977) was being driven on the Coventry Road, in the parish of Sheldon, at the speed of about fifty miles an hour, which was very dangerous to the public, having regard to all the circumstances of the case. There were four persons occupying the motor car on the occasion referred to, viz., the appellant, Miss Victoria Godwin, Charles Sangster, and Fred Nicholls (the

appellant's chauffeur). The appellant and Victoria Godwin occupied the front seats of the car, and Charles Sangster and Fred Nicholls occupied seats in the body of the car. Victoria Godwin was a certificated expert motor car driver and held a licence to drive motor cars. At the hearing of the appeal a number of witnesses were called on behalf of the prosecution to prove that the appellant was driving the car on the occasion in question. For the defence the appellant and the other three persons in the car were called to prove that Miss Godwin was then driving it. The appellant was an experienced driver of motor cars, and the quarter sessions were satisfied that, whether he or Miss Godwin was driving the car on the occasion in question, he must have known that the speed at which the car was being then driven was very dangerous to the public, having regard to the locality and to all the circumstances of the case. If Miss Godwin was then driving, she was doing so with the consent and approval of the appellant, who was the owner and in control of the car and was sitting by her side, and he could and ought to have prevented her driving at such excessive and dangerous speed, but instead thereof he allowed her to do so and did not interfere in any way. Having regard to the above facts, the Court of quarter sessions dismissed the appeal with costs, holding that it was unnecessary to decide whether the appellant was himself driving or not.

The question for the opinion of the Court was whether the decision of the Court of quarter sessions was right in point of law.

Avory, *K.C.*, and *Maddocks*, for the appellant. The quarter sessions have not found as a fact that the appellant was himself driving the car on the occasion in question, and it must therefore be assumed that the conviction was affirmed on the ground that the appellant had aided and abetted the commission of the offence. The conviction cannot stand. First, there was no evidence that the appellant did, in the words of s. 5 of the Summary Jurisdiction Act, 1848 (Jervis's Act) (1), "aid, abet, counsel, or

(1) 11 & 12 Vict. c. 43, s. 5: "Every person who shall aid, abet, counsel, or procure the commission of any offence, which is or hereafter

1906

DU CROS v. LAMBOURNE

procure" the commission of the offence. The facts stated only amount to this, that the appellant was sitting in the car, and did nothing to prevent it from being driven at a dangerous speed. Mere passive acquiescence is not sufficient to justify a conviction for aiding and abetting. In the language of Hawkins J. in *Reg.* v. *Coney* (1), "to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal." Secondly, the appellant having been charged as the principal offender, he could not be convicted summarily of aiding and abetting. The object of s. 5 of the Summary Jurisdiction Act, 1848, was to enable justices to try a principal in the second degree with the principal in the first degree, or before or after his conviction, and thus to get rid of the application of the old doctrine that an accessory could not be tried till the principal had been convicted. It is to be observed that the language of s. 5 of the Act of 1848 is very different from that of s. 8 of the Aiders and Abettors Act, 1861 (24 & 25 Vict. c. 94), which deals with the case of misdemeanours tried on indictment, and which expressly provides that an accessory may be tried, indicted, and punished as a principal. There is no analogous provision in s. 5 of the Act of 1848, and since the power of justices to convict summarily for aiding and abetting is purely statutory and derived solely from s. 5, it follows that a person charged as a principal cannot be summarily convicted as an aider and abettor. It is true that *Benford* v. *Sims* (2) is opposed to this contention, but in that case no one appeared to argue on behalf of the respondent, and the distinction between the language of s. 5 of the Act of 1848 and s. 8 of the Act of 1861 was not pointed out

---

shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed."

(1) (1882) 8 Q. B. D. 534, at p. 557.

(2) [1898] 2 Q. B. 641.

to the Court. *Benford* v. *Sims* (1) was wrongly decided, and ought not to be followed.

McCardie, for the respondent. On the facts stated in the case it was open to the justices to convict the appellant either as principal—*Wheatley* v. *Patrick* (2)—or as an aider and abettor. In the case of misdemeanours all parties concerned in the commission of the offence are principals: *Reg.* v. *Burton* (3); *Reg.* v. *Greenwood* (4); and though a man be charged as principal, if the evidence shews that he was merely aiding and abetting, he can nevertheless be convicted: *Stacey* v. *Whitehurst.* (5) There is no ground for the suggested distinction in this respect between indictable misdemeanours and offences punishable on summary conviction: Burn's Justice, 30th ed. vol. 3, p. 1008; Archbold's Criminal Pleading, 23rd ed. p. 16. *Benford* v. *Sims* (1) was rightly decided.

Avory, K.C., replied.

LORD ALVERSTONE C.J. This appeal raises two important points, one of law and the other as to the proper conclusion to be drawn from the facts stated in the case. The main argument addressed to us on behalf of the appellant on the first point was based on the ground that the appellant was not charged in respect of that which he was really doing, viz., aiding and abetting the driving of the car at a speed dangerous to the public, but was charged with having himself driven the car, and it is contended that having been charged as a principal he cannot be convicted on this information as an aider and abettor. It is important in dealing with this point to bear in mind that in the case of crimes other than felonies there is no distinction between a principal offender and aiders and abettors; as was pointed out by Blackburn J. in *Reg.* v. *Burton* (3), there is no such person as an accessory in point of law in a misdemeanour.

I think, also, that in connection with another argument which has been advanced it is necessary to observe that, as stated

(1) [1898] 2 Q. B. 641.
(2) (1837) 2 M. & W. 650.
(3) (1875) 13 Cox, C. C. 71.
(4) (1852) 2 Den. Cr. C. 453.
(5) (1865) 18 C. B. (N.S.) 344.

1906

DU CROS v. LAMBOURNE.

Lord Alverstone C.J.

in Russell on Crimes, 6th ed. vol. 1, at p. 184, s. 8 of the Aiders and Abettors Act, 1861, which was framed on s. 26 of 7 & 8 Geo. 4, c. 30, is really only declaratory of the common law on the subject. Mr. Avory contended that the word "misdemeanour" in s. 8 of the Act of 1861 is there used as applying only to indictable offences. I do not agree. In Burn's Justice, 30th ed. vol. 3, at p. 1008, under the title "Misdemeanour," it is stated that: "This word, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name. . . . . A misdemeanour is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; and misdemeanours comprehend all indictable offences which do not amount to felony. . . . . In crimes below the degree of felony there can be no accessories; but all persons guilty therein, if concerned at all, are principals." That being, in my opinion, a correct statement as to the meaning of misdemeanour, we must consider whether Mr. Avory is right when he says that in construing s. 5 of the Summary Jurisdiction Act, 1848, we must apply a different rule from that which would be applied in construing s. 8 of the Act of 1861. Keeping in view the fundamental distinction between felonies and misdemeanours and the impossibility of there being in the case of misdemeanours accessories or aiders and abettors as distinct from principals, one finds that s. 5 of the Act of 1848 provides that a person aiding and abetting may be charged with the principal offender and is liable to the same punishment. Prima facie I should have thought that that meant charged with the same offence as the principal offender. It is true, as the case of *Stacey* v. *Whitehurst* (1) shews, that aiders and abettors may be charged separately, but it was pointed out in that case that they could also be charged as principals. It is contended that that is true only of misdemeanours in the limited sense of indictable misdemeanours, and Mr. Avory relies on the difference between the language of s. 5 of the Act of 1848 and s. 8 of the Act of 1861. I am not prepared to say that s. 8 does not apply to summary convictions. Having regard to the nature of the provisions of that section, it may have been intended as a general

(1) 18 C. B. (N.S.) 344

enactment applying to all offences, and I am inclined to think that the word "misdemeanour" is used in that section in its wide sense, and that the operation of the section is not limited to misdemeanours tried on indictment. The question which we have to decide has, however, already come before this Court in the case of *Benford* v. *Sims*. (1) It is quite true that no counsel appeared for the respondent in that case, and that the Court therefore had not the assistance of hearing an argument on both sides, but it is a mistake to suppose that this question was not present to the minds of the learned judges who decided that case. Ridley J. said (2): "In my opinion, however, s. 5 of Jervis's Act may properly be read as meaning that a person who knowingly counsels such offences to be committed is to be proceeded against and convicted for the same either together with the principal offender or before or after his conviction, and may be treated throughout as the principal offender"; and Channell J. said (3): "It seems to me that the true construction of s. 5 is to make anybody who aids, abets, counsels, or procures, liable to be proceeded against in every respect as if he were a principal offender." That is both excellent common sense and good law, and bearing in mind that in respect of crimes less than felony the law does not draw any distinction between principals and others, I have come to the conclusion that the appellant could on this information be convicted of aiding and abetting, assuming that there was evidence that the appellant did aid and abet the commission of the offence. It has been contended on his behalf that there was no evidence, and reliance was placed on certain of the judgments in *Reg.* v. *Coney* (4) in support of this contention. *Reg.* v. *Coney* (4) was a case of spectators at a prize-fight, and I do not think that the general language used in the judgments was intended to be, or can be, treated as applying to every kind of case. We have to consider the facts found in this case. The case states that the appellant must have known that the speed of the car was dangerous; that if Miss Godwin was driving, she was doing so with the consent and approval of the appellant, who was in control of the car, and that he could, and ought to, have

(1) [1898] 2 Q. B. 641.
(2) Ibid. at p. 644.
(3) Ibid. at p. 646.
(4) 8 Q. B. D. 534.

1906

DU CROS v. LAMBOURNE.

Lord Alverstone C.J.

prevented her from driving at this excessive and dangerous speed, but that he allowed her to do so and did not interfere in any way. I will not attempt to lay down any general rule or principle, but having regard to these findings of fact, it is, in my opinion, impossible to say that there was in this case no evidence of aiding and abetting on the part of the appellant. The case further states that, having regard to the above facts, the Court of quarter sessions dismissed the appeal, holding that it was not necessary to decide whether the appellant was himself driving or not. This can only mean that the mind of the Court had been addressed to the question of aiding and abetting, and it being in my opinion impossible to say that there was no evidence on which the appellant could be convicted of aiding and abetting, this appeal must be dismissed.

RIDLEY J. I agree, and have very little to add. I desire to reserve my opinion on the question as to whether s. 8 of the Aiders and Abettors Act, 1861, applies to summary convictions. With regard to *Benford* v. *Sims* (1), I still think that my judgment was correct. It would, of course, have been more satisfactory if the case had been argued on both sides; and perhaps my judgment does seem to go rather farther than was necessary for the actual decision of that case.

DARLING J. I am of the same opinion. I think that there was ample evidence on which the appellant could be convicted of aiding and abetting Miss Godwin in driving the car at a speed dangerous to the public. The appellant was the owner of the car and in control of it, and he was therefore the person to say who should drive it. The case finds that he *allowed* (I emphasize that) Miss Godwin to do so; that he knew that the speed was dangerous, and that he could and ought to have prevented it. Now, does it affect the validity of the conviction that the appellant was not charged with aiding and abetting but with having driven the car himself? I do not think that it does. He was charged with a misdemeanour. It is erroneous to speak of him as an accessory, because an accessory before the fact is,

(1) [1898] 2 Q. B. 641.

1906

DU CROS v. LAMBOURNE.

Darling J.

as Blackstone, following Hale, says (1): "One who being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime." The appellant was present at the commission of the offence, and therefore was not an accessory. Being present, he was a principal, but a principal in the second degree. Then, was it necessary that he should be charged expressly with aiding and abetting? That question is, in my opinion, concluded by the decision of this Court in *Benford* v. *Sims*. (2) I entirely agree with the judgments and the reasoning of that case, and I have nothing to add to them.

Appeal dismissed.

Solicitors for appellant: *Indermaur & Brown, for Maddocks & Co., Coventry.*

Solicitors for respondent: *Stow, Preston & Lyttelton, for Ansell & Asfhord, Birmingham.*

F. O. R.

HANCOCK & CO. *v.* GILLARD.

1906

Oct. 25.

Licensing Acts—Compensation Charge—Deduction of Amount paid by Licence-holder from Rent—Income Tax—Right of Tenant to deduct Income Tax paid on behalf of Landlord—"Rent payable"—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Sched. A, No. IV., Ninth Rule—Licensing Act,* 1904 (4 *Edw.* 7, *c.* 23), *s.* 3.

The right given by s. 3 of the Licensing Act, 1904, to a licence-holder to deduct from his rent a proportion of the amount paid by him in respect of compensation charges does not affect the "rent payable" to the landlord within the meaning of the Income Tax Act, 1842, and therefore the tenant of licensed premises is entitled to deduct from the next payment of rent the tax that he has paid on the total rent payable by him to his landlord, although he has not paid to the landlord the whole amount of that rent, but has deducted from it a proportion of the compensation charge in accordance with the provisions of the Licensing Act, 1904.

CASE stated by consent under Order XXXIV.

The action was brought to recover a sum of 14*s.* as balance of rent due to the plaintiffs from the defendant.

(1) Blackstone's Commentaries, iv. 36. (2) [1898] 2 Q. B. 641.

1906

HANCOCK & Co. v. GILLARD.

(1.) The plaintiffs are the freeholders of the Neville Hotel, Clare Road, Cardiff, a fully licensed house. By an indenture of lease dated December 18, 1889, and made between the plaintiffs and one George Priest, the plaintiffs demised the said hotel (then being and still being duly licensed as aforesaid) to the said George Priest for twenty-one years from October 10, 1889, at the yearly rent of 100*l.* payable quarterly on January 10, April 10, July 10, and October 10 in every year, free from every deduction except property tax. The defendant is the assignee of the said lease, and is the tenant and occupier of the said hotel and holds the licences in respect thereof for the sale of intoxicating liquors.

(2.) The charge imposed under the Licensing Act, 1904, s. 3, sub-s. 1, in respect of the said on-licence for the year 1905, was a sum of 20*l.*, which sum was on October 10, 1905, duly paid by the defendant, together with the duties on his excise licences, to the Inland Revenue authorities. The defendant thereupon became entitled under sub-s. 3 of s. 3 of the Licensing Act, 1904, to make a deduction from rent calculated in accordance with the Second Schedule of the said Act. The said deduction from rent so authorized is 70 per cent. of the charge of 20*l.* or 14*l.*

(3.) Upon his next payment of rent after October 10, 1905, viz., on January 10, 1906, the defendant in fact paid to the plaintiffs the sum of 11*l.* only, being the sum arrived at by deducting the said sum of 14*l.* from one quarter of the 100*l.* reserved as rent under the said indenture of lease of December 18, 1889. No question was in fact raised or considered by either party as to whether the defendant was entitled to deduct the whole 14*l.* from a single quarter's instalment of rent or could deduct only a fourth part of such sum from any one quarter's instalment of rent.

(4.) The said hotel is assessed to income tax, Sched. A, at 291*l.* 14*s.*, and between January 10, 1906, and April 10, 1906, income tax at the current rate of 1*s.* in the pound on this assessment, amounting to 14*l.* 11*s.* 8*d.*, was duly paid by the defendant. The defendant thereupon should deduct under the Income Tax Act, 1842, s. 60, Sched. A, No. IV., Ninth Rule, by reason of his said payment of income tax from his next instalment of rent, which

instalment became due on April 10, 1906, so much of the tax paid by him as it is provided shall be deducted under the said provisions of the Income Tax Act, 1842.

(5.) The defendant claims to deduct from such instalment of rent the sum of 5*l.*, being 1*s.* in the pound on the whole sum of 100*l.* reserved as rent under the said indenture of lease of December 18, 1889, without having any regard to the deduction of 14*l.* referred to in paragraphs 2 and 3 hereof.

(6.) The plaintiffs contend that the defendant is not entitled to deduct the sum of 5*l.* so arrived at, but is entitled to deduct only 4*l.* 6*s.*, being 1*s.* in the pound on 86*l.*, to which the said sum of 100*l.* is reduced after the said deduction of 14*l.* from rent has been made.

(7.) The defendant accordingly, on or about April 10, 1906, paid to the plaintiffs in respect of rent the sum of 20*l.* only, being the difference between 25*l.* and 5*l.*, and declined, and still declines, to pay the further sum of 14*s.* which the plaintiffs demand of him.

The question for the Court is whether the plaintiffs are entitled to be paid the said 14*s.* or not.

If yes—judgment to be given for the plaintiffs for 14*s.*

If no—judgment to be given for the defendant. (1)

Danckwerts, K.C. (*J. A. Simon* with him), for the plaintiffs. The effect of the Licensing Act, 1904, on the Income Tax Act, 1842, is to reduce the amount of "rent payable" to the landlord

(1) By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. A, No. IV., Ninth Rule: "The occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being" at the current rate of the tax for the time being "which deduction shall be made out of the first payment thereafter to be made on account of rent . . . ."

By the Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, sub-s. 3: "Such deductions from rent as are set out in the Second Schedule to this Act may . . . . be made by any licence-holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

By Sched. II.: "A person whose unexpired term does not exceed . . . . 5 years may deduct a sum equal to 70 per cent. of the charge. . . . . But the amount deducted shall in no case exceed half the rent."

BIBL. LONDIN UNIV.

1906

HANCOCK & CO. v. GILLARD.

within the meaning of the Rule. The result is that the amount of tax which the tenant is entitled to deduct out of the first payment thereafter to be made on account of rent is also proportionately reduced. The power of deduction from rent of the compensation charge given by the Licensing Act, 1904, effects a statutory reduction of the rent and has the same result as an agreement between the parties to pay and receive less rent.

Avory, K.C. (*Rowlatt* with him), for the defendant. The tenant has paid income tax on the landlord's behalf on the full amount of the rent payable in respect of the premises, and he is therefore entitled to deduct the amount so paid from his next payment of rent. The scheme of the Act of 1842 was that the tenant should pay the income tax on behalf of the landlord on the rent payable to the landlord in respect of the premises, and should recover the amount so paid from the landlord by deducting it from his next payment of rent. The Licensing Act, 1904, has no effect on the words "rent payable" in the Act of 1842.

[He was stopped.]

Danckwerts, K.C., replied.

BIGHAM J. I think that the defendant is entitled to judgment in this case. The plaintiffs here are the landlords, and bring this action to recover 14*s.* which the defendant has deducted from the rent. His right to deduct the 14*s.* from the rent depends, in the first place, upon s. 60 of the Income Tax Act, 1842, and if that Act stood alone, unaffected by the Act of 1904, there can be no doubt that he would be entitled to deduct it. The Act says that the occupier shall deduct so much of the duty in respect of the rent payable to the landlord as is the poundage for the time being. He has done that. But it is said that the "rent payable" to the landlord has been affected by the statute of 1904, so that the rent payable to the landlord, within the meaning of the Income Tax Act, has been reduced by a sum of 14*l.*, and that therefore the tenant is not entitled to keep back 14*s.*

In my opinion the Act of 1904 was never intended in any way whatever to affect the Income Tax Act of 1842, nor does it by its terms affect that Act; all that the Act of 1904 does is to

declare that the tenant may make, in respect of the charges which are levied upon him under that Act, a deduction from his rent. It does not alter the rent payable at all. The rent payable remains the same; but he is entitled to recoup himself, out of the money which he owes to his landlord, the charges which he has been required to pay under this Act. In my opinion that does not affect, in any way whatever, the meaning of the expression "rent payable" in the Income Tax Act of 1842. The amount of the tax which the tenant is entitled to deduct from his landlord by virtue of that Income Tax Act remains absolutely unaffected by the provisions of the Act of 1904.

There must therefore be judgment for the defendant with costs.

Judgment for the defendant.

1906

HANCOCK & Co. v. GILLARD.

Bigham J.

Solicitors for plaintiffs: *Godden, Son & Holme, for F. Gaskell, Cardiff.*

Solicitors for defendant: *Field, Roscoe & Co., for A. F. Hill, Cardiff.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A. 1906 *Nov.* 5.

IN THE MATTER OF AN ARBITRATION BETWEEN CANNINGS, LIMITED AND THE COUNTY COUNCIL OF MIDDLESEX.

Light Railways Act, 1896—*Order incorporating Lands Clauses Acts—Arbitration—Costs—Taxation by Master of Supreme Court—Review of Taxation—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *ss.* 12, 13—*Lands Clauses (Taxation of Costs) Act*, 1895 (58 & 59 *Vict. c.* 11), *s.* 1.

Where an order under the Light Railways Act, 1896, incorporates the Lands Clauses Acts, and on a submission to arbitration under the Light Railways Act the arbitrator awards costs to be paid by one of the parties to the submission, either party can require, under the Lands Clauses (Taxation of Costs) Act, 1895, s. 1, that the costs shall be taxed and settled by one of the Masters of the Supreme Court, whose decision is not open to review.

APPEAL from an order of Lawrance J. at chambers.

Under the County of Middlesex Light Railways Order, 1901, which incorporated the Lands Clauses Act as varied by the

C. A. 1906

CANNINGS, LIMITED AND MIDDLESEX COUNTY COUNCIL, *In re.*

Light Railways Act, 1896, the Middlesex County Council had power to make certain railways therein described, and, by the County of Middlesex Light Railways (Lands) Order, 1903, the county council acquired power to take such of the lands shewn on the plans, and described in the book of reference, as might be required for the purpose of widening the roads on which light railways were, by the Order of 1901, authorized to be laid. Cannings, Limited, were the lessees and occupiers of seven shops, with the gardens in rear thereof, in High Street, Harlesden, and the limit of the land occupied by them which the county council were entitled to take was the frontage of the seven shops to High Street, varying in depth between 4 ft. 6 ins. and 5 ft. 5 ins. The county council gave a notice to treat for the whole of the land occupied by Cannings, Limited; no objection was taken to this notice, and Cannings, Limited, sent in particulars of their claim in response to it. An arbitrator was appointed under the common seal of the county council and of Cannings, Limited, to determine the amount of purchase-money and compensation, and the compensation for damage payable by the county council. The submission was headed "in the matter of the County of Middlesex Light Railways (Lands) Order, 1903, and in the matter of the Light Railways Act, 1896, and in the matter of the Arbitration Act, 1889." The arbitrator awarded a certain sum for compensation, and settled the cost of the award, but he gave no direction as to the party by whom the costs were payable. On the application of Cannings, Limited, an order was made referring the award back to the arbitrator to determine the question of the costs of the reference and award. The arbitrator by his second award directed that the costs and charges of Cannings, Limited, of and incident to the original reference and award, and also of the second reference and award, were to be paid to them by the county council.

Cannings, Limited, thereupon brought in their bill of costs, which was taxed by a Master. The county council raised objections to the taxation, which were overruled, and on appeal the learned judge dismissed the application to refer the matter back to the Master to vary his certificate. Against this order the county council appealed.

At the hearing of the appeal a preliminary objection was raised to the appeal on the ground that the submission to arbitration was not under the Light Railways Act, 1896, or the Lands Clauses Acts, but was under the Arbitration Act. The Court (Cozens-Hardy L.J. and Farwell L.J.) overruled the objection, upon the ground that it was competent to Cannings, Limited, had the council given a notice relating only to the land within the limits of deviation, to give a counter-notice, under s. 92 of the Lands Clauses Act, 1845, to the county council, requiring them to take the whole of the land, the result of which would have been to confer a power on the county council to purchase the whole. It was competent to the parties to waive this irregularity, and, as the notice to treat for the whole was given and accepted, it was too late to raise the contention that the purchase was not under the Light Railways Act, but was voluntary. The case therefore proceeded.

Oct. 29. *S. A. T. Rowlatt*, for the Middlesex County Council. By s. 13, sub-s. 1, of the Light Railways Act, 1896, where any order under the Act incorporates the Lands Clauses Acts, a reference to a single arbitrator is substituted for the provisions of those Acts as to determination by verdict of a jury, arbitration or justices, and sub-s. 3 says that "the Arbitration Act, 1889, shall apply to any arbitration under this section." By s. 1 of the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, is to have the same effect in all respects as if it had been made an order of Court. By s. 2, "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission." Paragraph (i.) of the schedule declares that the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof. The combined effect of these provisions is that the matters of the incidence of costs and the taxation

C. A. 1906

CANNINGS, LIMITED AND MIDDLESEX COUNTY COUNCIL, *In re.*

in this case are governed by the Arbitration Act. The arbitrator may tax or settle the amount of costs to be paid, but if he does not do so, the taxation is by a Master of the High Court as if the submission had been made an order of Court, and is therefore subject to review.

Coward, K.C., and *Bartley Denniss*, for Cannings, Limited. The order under the Light Railways Act incorporates the Lands Clauses Acts. The effect of ss. 12 and 28 of the first-mentioned Act in conjunction with s. 23 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), is to include in that expression the Lands Clauses (Taxation of Costs) Act, 1895, as an Act for the time being in force amending those Acts. By s. 1 of that Act, where a question of disputed compensation, under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, is determined by the verdict of a jury or by arbitration, the costs shall, if either party so requires, be taxed and settled as between the parties by a Master of the Supreme Court. The Master in such a case is obviously persona designata, and his certificate is not subject to review. The argument put forward on behalf of the county council gives no effect to that incorporation, and such a result could only be arrived at by express enactment. In these circumstances s. 13, sub-s. 3, of the Light Railways Act cannot be taken as applying the Arbitration Act to costs, which moreover are specifically dealt with by sub-s. 2. It requires express words to give a right to review the decision of a Master on taxation of costs : *Sandback Charity Trustees* v. *North Staffordshire Ry.* (1)

[They referred to *Baxter* v. *Midland Ry. Co.* (2)]

S. A. T. Rowlatt, in reply.

Cur. adv. vult.

Nov. 5. COZENS-HARDY L.J. read the following judgment:—In my opinion the objection taken on behalf of Messrs Cannings that the taxing Master's certificate is not open to review by the Court is well founded.

The provisional order under which the land was taken expressly incorporates the Lands Clauses Acts as varied by the Light

(1) (1877) 3 Q. B. D. 1. (2) (1905) 93 L. T. 538.

Railways Act, 1896. This incorporation includes the Lands Clauses (Taxation of Costs) Act, 1895, and I cannot find anything varying that Act or inconsistent with that Act in the Light Railways Act, 1896. It has been held by this Court that a taxation under the Lands Clauses Act, 1845, is by the taxing Master as a designated person, and not as an officer of the Court whose decision is subject to review: *Shrewsbury (Earl of)* v. *Wirral Railways Committee.* (1) I desire to express no opinion upon the point decided by A. T. Lawrence J. in the case of *Baxter* v. *Midland Ry. Co.* (2), but assuming that his view was correct, that the incidence of costs under the Light Railways Act is now to be determined by the arbitrator, and not according to the rigid code contained in the Lands Clauses Act, 1845, I still think that when, as in the present case, the arbitrator has awarded costs to be paid by the county council, such costs must be taxed at the request of the claimants under the Lands Clauses (Taxation of Costs) Act, 1895.

For these reasons I think that this appeal must be dismissed.

FARWELL L.J. We have already decided that the taxation in this case is under the Light Railways Act, 1896, and it now remains for us to determine whether, on the true construction of that Act, the reference is to the taxing Master as persona designata, or to him in his official capacity so as to make his taxation subject to review by the Court.

In this case the county council's provisional orders incorporate the Lands Clauses Act, so that ss. 12 and 13 of the Light Railways Act come into operation as the material sections, and the Clauses Acts mentioned in s. 12, by the joint operation of s. 28 and the Interpretation Act, 1889, s. 23, include the Lands Clauses (Taxation of Costs) Act, 1895.

Before dealing with the words of the Light Railways Act, it will be useful to state the position in which the taxation of costs of arbitrations and awards stood at the time of the passing of the Act. Under the Lands Clauses Act, 1845, s. 34, the amount of all the costs of the arbitration and incident thereto was to be settled by the arbitrator, but their incidence depended on the

(1) [1895] 2 Ch. 812. (2) 93 L. T. 538.

C. A. 1906

CANNINGS, LIMITED AND MIDDLESEX COUNTY COUNCIL, *In re.*

Farwell L.J.

amount of the award as compared with that offered by the undertakers, and was settled automatically, without any discretion being given to the arbitrators.

This section, so far as it gave the arbitrators exclusive authority to settle the amount of costs, was qualified by the Lands Clauses Act, 1869, afterwards replaced by the Lands Clauses (Taxation of Costs) Act, 1895, which enabled either party to have such costs taxed and settled by a Master of the Supreme Court. His taxation is not subject to review, because the reference is to him as a person designated by the statute: *Sandback Charity Trustees* v. *North Staffordshire Ry.* (1); *Shrewsbury (Earl of)* v. *Wirral Railways Committee.* (2)

In 1889 the Arbitration Act was passed, the 1st section of which enacts that every submission, defined in s. 27 to be a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, shall have the same effect in all respects as if it had been made an order of Court. Sect. 2 makes the provisions of the First Schedule to the Act applicable to all submissions under the Act, unless a contrary intention appears, and s. 24 makes the Act apply to every arbitration under any Act passed before or after its commencement, as if the arbitration were pursuant to a submission, except in so far as the Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act. This is important, as the absence of a submission in writing under the Arbitration Act, to which I referred in my former judgment, would not prevent the application of the Act to an arbitration under the Light Railways Act. The important provision in the schedule to the Arbitration Act is: "(i.) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." It appears plain, therefore, that costs under the Lands Clauses Acts may be taxed and settled by the arbitrator, unless either party

(1) 3 Q. B. D. 1. (2) [1895] 2 Ch. 812.

requires them to be taxed by a taxing Master, but that in both cases the taxation is by a special tribunal, and there is no appeal from its certificate.

The Light Railways Act, 1896, incorporates the Land Clauses (Taxation of Costs) Act, 1895, by virtue of ss. 11, 12, and 28 of the county council's provisional orders. In my opinion s. 13, sub-s. 1, of the Act throws no light on the question before us; nor does sub-s. 2, except that it shews that the question of costs was in the immediate contemplation of the Legislature. I doubt if r. 5 of the Rules of 1898 made under this sub-section is of any use, assuming that it can be referred to for the purpose of construing the Act, but the whole question turns on sub-s. 3. This sub-section appears to be introduced in order to exclude the exceptions in s. 24 of the Arbitration Act, so as to make that Act apply generally to the Light Railways Act; and A. T. Lawrence J. has held in *Baxter* v. *Midland Ry.* (1) that this overrides the provisions in s. 34 of the Lands Clauses Act, 1845, under which the costs depended on the relative amounts of the sum offered and the sum awarded, and gives the arbitrator full discretion to determine their incidence, because under the Arbitration Act costs are in the discretion of the arbitrator. Further, he may tax or settle the amount thereof, and if he does so as part of his award, there is no appeal from his finding—the parties must withdraw the costs from their submission if they desire to exclude his jurisdiction: *In re Prebble.* (2) If, however, he does not tax and settle, or if the parties do not include such taxation in their submission, then the general jurisdiction of the Court to direct taxation arises under s. 1 of the Arbitration Act by virtue of the submission being equivalent to an order of Court.

The Light Railways Act, 1896, has expressly incorporated the Lands Clauses (Taxation of Costs) Act, 1895, the sole object of which Act is to enable either of the parties to an arbitration to have the costs taxed by a taxing Master. Some effect must, in my opinion, be given to this incorporation, and I have come to the conclusion that the true result is that, although the costs may well be (as A. T. Lawrence J. has held) now in the discretion of

(1) 93 L. T. 538. (2) [1892] 2 Q. B. 602.

C. A.
1906

CANNINGS, LIMITED AND MIDDLESEX COUNTY COUNCIL, *In re.*

Farwell L.J.

the arbitrator, and he may tax and settle the amount if both parties agree, yet either party is at liberty to require them to be taxed by a taxing Master under the Act of 1895, and if this is done there is no appeal from such taxing Master's certificate. This construction gives effect to the incorporation of the Act of 1895, while the contrary construction would render such incorporation merely futile. It leaves the judgment of A. T. Lawrence J., which I assume, without expressing any opinion, to have been rightly decided, untouched, in that it interferes with none of the express provisions of the Arbitration Act, but displaces only the provision for taxation implied from making the submission an order of Court. It does this by virtue of an express provision in a later Act, and in so doing it conforms to the usual rule that when there are two public general Acts with inconsistent provisions the later Act prevails, and all the more so if its provision is express and that of the earlier Act is only implied.

Appeal dismissed.

Solicitors for plaintiffs: *Hyland, Atkins & Roger.*
Solicitor for defendants: *Sir R. Nicholson.*

A. M.

BASTABLE, Appellant *v.* LITTLE, Respondent.

1906

Nov. 6.

Constable—Obstructing Police in Execution of Duty—Giving Warning of "Police Trap"—Prevention of Crimes Amendment Act, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.

Two constables, having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. The respondent gave warning of this fact to approaching cars, which then slackened speed. There was no evidence that the respondent was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace—

Held, that the respondent was not guilty of the offence of obstructing the constables when in the execution of their duty within the meaning of s. 2 of the Prevention of Crimes Amendment Act, 1885.

Case stated by justices.

The information was laid by the appellant against the respondent for that he (the respondent) did on March 4, 1906, in the London Road in the borough of Croydon, wilfully obstruct certain police constables in the execution of their duty as such constables, contrary to the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 12, and the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75), s. 2.

The case stated that "on March 4, 1906, Henry Harris and Percival Suter, two constables of the Metropolitan Police Force, were engaged under and pursuant to the orders of the Commissioner of the Police of the Metropolis on special duty in the London Road, Croydon, within the Metropolitan Police District, which road is much used by all kinds of traffic, vehicular and pedestrian, between the hours of 11 A.M. and 12 noon, observing and timing the speed of motor cars driven along the said road, for the purpose of securing that such cars should not be driven at an unlawful rate of speed or otherwise in contravention of the Motor Car Acts, 1896 and 1903.

"Prior to the acts of the respondent hereinafter mentioned the metropolitan police authorities had caused three several distances of one furlong each (with intervals between them respectively) to be measured off upon the said road, so that, by timing cars as

1906

BASTABLE v. LITTLE.

they passed over the measured distances, the rates of speed at which such motor cars were being driven would be accurately ascertained. At the time of the acts of the respondent complained of in the information the said police constables were waiting to observe the speed of any motor cars that might pass over the aforesaid measured distances. The constables were at the times in question employed in the above manner under the directions of the Commissioner of Police and in the performance of their duty as metropolitan police constables within the Metropolitan Police District.

"The respondent, while the said police constables were so engaged in the discharge of their duty, by means of signals made with his hand and with a sheet of newspaper, and in one instance by calling out the words 'Police trap,' warned the drivers of motor cars which he saw approaching the said measured distances that the police were on the watch as aforesaid. By such means the said drivers may have been enabled to avoid travelling at an illegal speed over the said measured distances, the cars in every case slackening speed on the drivers being warned.

"The respondent at the time when he gave the warning above mentioned was fully aware that the said police constables were then engaged upon the above duty.

"The warnings of the respondent above mentioned were repeated by him upon upwards of a dozen occasions during a period of forty minutes while the said police constables were engaged upon the aforesaid duty.

"The respondent at the time aforesaid was not acting in concert with the said drivers of motor cars, nor was he in any way connected with any person or body of persons interested in the driving of motor cars."

The magistrates were of opinion that the acts of the respondent did not in law constitute an obstruction of the police constables in the execution of their duty within the meaning of the sections, and dismissed the information, but stated this case for the opinion of the Court. (1)

(1) By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 12, "Where any person is convicted of an assault on any con-

1906

BASTABLE v. LITTLE.

Danckwerts, K.C. (*Bodkin* with him), for the appellant. The respondent was guilty of an offence under the section. He was preventing the police from obtaining evidence of the pace at which the motor cars were travelling, and so was obstructing them in the execution of their duty. The fact that the speed of all the cars was slackened when the warning was given shews that the drivers knew they were proceeding at an excessive rate, and were therefore committing an offence against the Motor Car Acts. Where a man is committing or has committed a crime, and another person prevents the police from obtaining evidence of the commission of the crime, he is obstructing the police in the execution of their duty, even although he does not physically obstruct them.

Avory, K.C. (*Hemmerde* with him), for the respondent. The magistrates were right. There was no evidence that any offence was being committed or had been committed by the drivers of any of the motor cars, and it would be absurd to say that everyone who warns another not to commit an offence, lest he should be detected, is obstructing the police in the execution of their duty. The fact that the drivers slackened speed on receiving the warning is no evidence that they knew that they were going too fast and breaking the law.

The section only applies to actual physical obstruction of the constable.

Danckwerts, K.C., replied.

LORD ALVERSTONE C.J. In my opinion this case is not free from difficulty, and I am, for my own part, by no means satisfied that no offence was committed by the respondent. If the case had contained allegations that a breach of the law had been committed by any of these motor cars, and that there was a proximity of detection, the case would be different, but I think

---

stable when in the execution of his duty such person shall be guilty of an offence against this Act. . . . ."

By the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75), s. 2, "The provisions of the twelfth section of the said recited Act" (the Prevention of Crimes Act, 1871) "shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty."

1906

BASTABLE v. LITTLE.

Lord Alverstone C.J.

that the magistrates were right in holding that on the facts before them no offence was disclosed against s. 2 of the Prevention of Crimes Amendment Act, 1885. That section provides that the provisions of s. 12 of the Prevention of Crimes Act, 1871, which deals with assaults on constables when in the execution of their duty, shall apply to all cases of resisting or wilfully obstructing any constable when in the execution of his duty. I think that the section points to something done in regard to the duty which the constable is performing, and does not apply to what is done or said to third parties. To take an instance which was put during the argument: suppose a party of men are engaged in the offence of night poaching, and a person passing near warns them that the police are coming, I think it is clear that that could not be held to be an offence within this section.

We must not allow ourselves to be warped by any prejudice against motor cars, and so to strain the law against them. We are asked to infer from the fact that all the motor cars, on receiving the warning, slackened their speed, that all or most of them were then exceeding the speed limit and breaking the law. I do not think that we can draw any such inference. The magistrates only say that in consequence of the warning the drivers may have been enabled to avoid travelling at an illegal speed past the policemen. They do not say that as a fact they were at the time they received the warning travelling at an illegal rate of speed. I cannot draw the inference that the cars were breaking the law when they received the warning. I also attach importance to the fact that there was a complete absence of any evidence of conspiracy or agency on the part of the respondent and the drivers of the cars. Under the circumstances, therefore, I think that the magistrates came to a right conclusion, and that this appeal must be dismissed.

RIDLEY J. I am of the same opinion. I think that in order to constitute an offence under the section there must be some interference with the constable himself by physical force or threats. He must be either physically obstructed in doing his duty or at least threats must be used to prevent him from doing it.

DARLING J. I do not differ from the judgments that have been pronounced, but I do not feel inclined to say much more than that. If the case had stated definitely that any of these cars when approaching the measured mile was going at an illegal rate of speed, and that the warning prevented the police constables from taking the real pace of the car as it passed, and so securing the conviction of the driver, I should desire to reserve my opinion whether the respondent had committed an offence under the section, although no physical obstruction of the police constables in the execution of their duty had taken place. In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed and the warning is given in order that the commission of the crime may be suspended while there is danger of detection, with the intention that the commission of the crime should be re-commenced as soon as the danger of detection is past.

I do not wish to be understood to say that in order that there should be an offence under this section there must be some physical obstruction of the constable. In my opinion a policeman who in seeking information which might lead to the conviction of the perpetrators of a crime was wilfully misled by false information would be obstructed in the execution of his duty, and I should not like to say that the person who so wilfully misled him was not committing an offence within the meaning of this section.

LORD ALVERSTONE C.J. I also would wish to guard myself from saying that the only obstruction contemplated by this section is a physical obstruction.

Appeal dismissed.

Solicitors for appellant: *Wontner & Son.*
Solicitors for respondent: *Campbell, Hooper & Todd.*

A. P. P. K.

1906
Nov. 7, 8.

MARTIN, Appellant *v.* BENJAMIN and Another, Respondents.

Lottery—Keeping a Place for a Lottery—User on One Occasion only—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The use of a room on one occasion for the drawing of tickets in a lottery is not an offence under s. 2 of the Gaming Act, 1802, which forbids the keeping of any place for the purpose of a lottery.

Case stated by a metropolitan police magistrate.

The appellant laid an information against the respondents charging them that "on the 25th of April, 1906, they did keep a certain place, to wit the temporary reading room of the Furnishing Trades Exhibition holden at the Royal Agricultural Hall, Islington, for the purpose of exercising therein a certain lottery, to wit a lottery entitled 'Draw in aid of the Furniture Trades Provident and Benevolent Association,' contrary to 42 Geo. 3, c. 119, s. 2."

The following facts were proved at the hearing of the information:—The appellant visited the Royal Agricultural Hall about 10 a.m. on April 25. An exhibition called the Furnishing Trades Exhibition was then being held at the hall. The appellant purchased at a stall managed by one of the respondents a ticket for 1*s.* (The other respondent was the manager of the exhibition.) The ticket bore the number 459, and purported to be for a draw in aid of the Furniture Trades Provident and Benevolent Association for prizes presented by various persons, and bore also the notice, "Draw will take place 9 p.m. Wednesday, April 25th, in the Reading and Writing Room. Tickets 1s."

The ticket was torn for the appellant from a book of tickets and counterfoils. The appellant on the same day saw both the respondents and cautioned them not to allow the drawing in respect of which the ticket was sold to take place. He again visited the hall at 9 p.m. and in a temporarily erected building called a reading and writing room some forty or fifty people were assembled. The counterfoils of the tickets sold in connection with the drawing were placed together, mixed up, and the first six tickets drawn

determined the six winners of the prizes. The exhibition was for the trade and not for the general public, and admission to it was by ticket only. The drawing was for the benefit of the Furniture Trades Provident and Benevolent Association, in which the respondents were interested from benevolent motives. All monies received for the sale of the tickets were intended for and were handed over to the association, and the various articles of furniture which constituted the prizes were given for the benefit of the association, and the respondents did not make, and never intended to make, any profit out of the draw, and acted entirely from charitable motives. The magistrate doubted whether the mere using of the reading room for a few minutes on one occasion for the purpose of the draw was keeping an office or place for the purpose of exercising therein a lottery within the meaning of the section. He accordingly dismissed the summons, but stated this case for the opinion of the Court. (1)

The question whether the particular transaction constituted a lottery was not argued.

Danckwerts, K.C. (*Bodkin* with him), for the appellant. The Lottery Act, 1823 (4 Geo. 4, c. 60), extended the Gaming Act, 1802, and it is plain that every lottery is an offence in itself. There is no analogy between keeping a place for the purpose of betting and keeping a place for the purpose of a lottery: see per Lord Halsbury in *Powell* v. *Kempton Park Race Course Co.* (2) Each lottery is an offence in itself, while betting, to be an offence, must be more than one isolated act.

[He was stopped.]

Avory, K.C. (*J. B. Matthews* with him), for the respondents.

(1) By the Gaming Act, 1802 (42 Geo. 3, c. 119), s. 2: "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorised by parliament, or shall knowingly suffer to be exercised, kept open, shewn, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery, in his or her house, room, or place; . . . ."

(2) [1899] A. C. 143, at pp. 165, 166.

1906

MARTIN v. BENJAMIN.

The question here is not a question, as in *Powell* v. *Kempton Park Race Course Co.* (1), of what is a "place." It is a question whether the user of this room on one occasion for a lottery was a "keeping" of it within the meaning of s. 2 of the Act of 1802. In order to constitute a keeping there must be something like an habitual user of the place: *Shutt* v. *Lewis* (2); *Marks* v. *Benjamin*. (3) Persons holding bazaars for charities have never been prosecuted, though it is a common occurrence that a drawing or raffle takes place for articles presented for the purpose, because the user of the place is only casual and not habitual: *Reg.* v. *Davies*. (4) A single and solitary user of a place cannot amount to a keeping within the section.

Danckwerts, K.C., in reply. Every lottery has been declared to be a public nuisance (10 & 11 Will. 3, c. 17, s. 1), and therefore to use any place for the purpose of a lottery is an offence. The Betting Acts and the Lottery Acts are not analogous, and the decisions on the one set of Acts are no authorities on the other. In *Gregory* v. *Tuffs* (5) Lord Lyndhurst C.B. differed from *Shutt* v. *Lewis*. (2) [He also referred to *Reg.* v. *Crawshaw* (6); *Hardwick* v. *Lane*. (7)]

RIDLEY J. In my opinion the magistrate was right in dismissing the summons. The respondents were charged under s. 2 of the Gaming Act, 1802, with keeping a place for the purpose of exercising therein a certain lottery. The point is whether the use of the reading room for drawing the tickets amounted to keeping a place for the purpose of a lottery. I think it is possible that an offence was committed, but the question is whether it was the offence that was charged. Proceedings might possibly have been taken either under s. 41 of 4 Geo. 4, c. 60, for selling lottery tickets, or under 10 & 11 Will. 3, c. 17, s. 2, for keeping a lottery, as was the case in *Reg.* v. *Crawshaw*. (6) The Act of William III. was directed against the keeping of a lottery, and not against

(1) [1899] A. C. 143.
(2) (1804) 5 Esp. 128.
(3) (1839) 5 M. & W. 565.
(4) [1897] 2 Q. B. 199.
(5) (1833) 6 C. & P. 271.
(6) (1860) Bell, C. C. 303.
(7) [1904] 1 K. B. 204.

keeping a place for the purpose of a lottery, and by it all lotteries were declared to be common and public nuisances. So, too, the Act of George IV. was directed against the selling of tickets in any lottery. There is a material distinction between those Acts and the Act under which this charge was brought, which deals with keeping a place for the purpose of having a lottery there. Mr. Danckwerts has argued that this case is distinguishable from the cases cited by Mr. Avory because in those cases a series of acts was required in order to constitute an offence, while here a single lottery is a public nuisance and therefore an offence. No doubt that is so, but in the Act under consideration the offence is the "keeping" of an office or place for the purpose of a lottery, and I do not think that using a place once is keeping it for that purpose. In order to constitute a keeping there must, I think, be something habitual. I cannot distinguish this case from the cases which have been cited. In *Shutt* v. *Lewis* (1) it was held that a mere temporary appropriation of a room was not a keeping. *Marks* v. *Benjamin* (2) is also strongly in point. All the cases shew that there must be something like an habitual keeping to come within the statute. As to *Powell* v. *Kempton Park Race Course Co.* (3), I think that the remarks of Lord Halsbury in that case must be taken in reference to what he was there deciding, namely, what was a "place" under the Act, and not in reference to the word "keep." I think, therefore, that his observations have no bearing on the point that we have to decide. I think that the user on one occasion does not constitute a keeping within the section, and that the magistrate was right.

DARLING J. I am of the same opinion. The respondents were charged under the Act of 1802, and we must consider whether they were properly charged under that Act. I do not say that they might not have been convicted under some other statute, but I do not think that they can be properly convicted of keeping an office or place. I think, therefore, that the cases cited by Mr. Avory are in point.

In the earlier Act it seems to me that lotteries were considered

(1) 5 Esp. 128. (2) 5 M. & W. 565.
(3) [1899] A. C. 143.

1906

MARTIN v. BENJAMIN.

Darling J.

objectionable because they interfered with a State monopoly. Later opinion has, however, changed, and lotteries are now condemned on other grounds. Whether this particular lottery was an offence or not, I am clear that the respondents were not keeping a place within the meaning of the section, and I agree that an isolated or incidental use of a house for that purpose is not such a keeping.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondents: *A. J. Benjamin.*

A. P. P. K.

1906
Nov. 8.

GUARDIANS OF WANTAGE UNION *v.* GUARDIANS OF BRISTOL UNION.

Poor Law—Removal—Adoption of Pauper Child by Guardians—Poor Law Act, 1899 (62 & 63 *Vict. c.* 37), *s.* 1.

Where the guardians of a poor law union have passed a resolution under the Poor Law Act, 1899, that the rights and powers of the parent of a child maintained by them shall vest in them, they are not precluded by that resolution from subsequently removing the child to the union in which it has a settlement.

CASE stated under s. 11 of 12 & 13 Vict. c. 45.

The pauper Gertrude Fisher was the illegitimate child of Mary Ann Fisher, and was born at Bristol on January 24, 1903.

Her mother, Mary Ann Fisher, had a settlement in the Wantage Union, and had not gained a status of irremovability in the Bristol Union. On May 20, 1904, Mary Ann Fisher was convicted for neglecting the pauper and was sentenced to two months' imprisonment, and the pauper was on May 14, 1904, admitted to the workhouse at Bristol. On July 1, 1904, the guardians of the Bristol Union adopted a report received from their schools and boarding-out committee recommending the adoption of the pauper under the Poor Law Acts, 1889 and 1899, on the ground that her mother, Mary Ann Fisher, had for years lived an immoral life. This resolution has not been rescinded. On May 9, 1906, an order of justices was obtained by the guardians of the Bristol Union adjudging the pauper to be settled in the Wantage Union.

1906

WANTAGE UNION v. BRISTOL UNION.

The question for the opinion of the Court was whether the guardians of the Bristol Union were precluded from parting with the custody of the pauper by reason of the exercise of the powers conferred upon them by the Poor Law Acts, 1889 and 1899. (1)

Macmorran, K.C. (*Holman Gregory* with him), for the guardians of the Wantage Union. There was no power to make an order for the removal of the pauper. The Poor Law Acts, 1889 and 1899, legalize the adoption by the guardians of pauper children in certain cases. So long as the resolution is not rescinded the rights and powers of the pauper's mother vest in the guardians, and they are able to resist any attempt by her to obtain possession of the child. If the child is transferred to another union the guardians of that union have no such powers, and would have no answer to an application by the mother for the custody of the child. The resolution can only be rescinded if the guardians think that it will be for the benefit of the child that it should be rescinded. The pauper was not chargeable to the Bristol Union when it was admitted to the workhouse on May 14, 1904, and between that date and July 1, 1904, when the guardians passed the resolution practically adopting the child, they might have obtained an order removing it to the Wantage Union, but so long as that resolution is not rescinded they have no power to do so.

Rawlinson, K.C. (*Sydney Davey* with him), for the guardians of the Bristol Union. The Poor Law Acts, 1889 and 1899, have nothing to do with pauper settlement, and leave it entirely unaffected. They deal only with parental rights, and allow the

(1) By the Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 1 (1.): "Where a child is maintained by the guardians of a poor law union and . . . . (iv.) a parent of the child has been sentenced to imprisonment in respect of any offence against any of his or her children . . . . the guardians may at any time resolve that until the child reaches the age of eighteen years all the rights and powers of such parent as aforesaid . . . . in respect of the child shall . . . . vest in the guardians, and thereupon those rights and powers shall so vest accordingly, and shall continue so vested whether the child does or does not continue to be maintained by the guardians. Provided that the guardians may rescind the resolution if they think that it will be for the benefit of the child that it should be rescinded. . . . ."

1906

WANTAGE UNION v. BRISTOL UNION.

guardians to take over for a certain period the rights of the parent over the child.

LORD ALVERSTONE C.J. The question that we are asked in this case is whether the guardians of a union are precluded from parting with the custody of a child because they have passed a resolution under s. 1, sub-s. 1, of the Poor Law Act, 1899. I should be sorry to decide this case on the ground that that resolution had not been rescinded. The answer to Mr. Macmorran's argument seems to me to be that the Poor Law Acts, 1889 and 1899, were not dealing with questions of settlement at all, but with the question of the custody of the child until it is eighteen years of age. The Act says that the rights and powers of the parent are to vest in the guardians on their passing such a resolution. That shews that only the rights and powers of the parent vest in the guardians, and the power to rescind the resolution shews, I think, that no further rights and powers are intended to be affected. It may very well be that the settlement of the child may not be ascertained when the resolution is passed, and it is plain that the provision is for the protection of the child. By sub-s. 2 a Court of summary jurisdiction has power to rescind the resolution under certain circumstances, and this also seems to shew that the Legislature was not dealing with removability at all. Many statutes have been passed dealing with pauper settlement, and I think that if it had been intended in these Acts to affect the question of removability we should have found words to that effect in the statutes. I think, therefore, that, whether the resolution was rescinded or not, the guardians of Bristol were not deprived of the right to say that this pauper child was chargeable to the Wantage Union.

RIDLEY and DARLING JJ. concurred.

Judgment accordingly.

Solicitors for the guardians of the Wantage Union: *Meredith, Roberts & Mills, for E. B. Ormond, Wantage.*

Solicitors for the guardians of the Bristol Union: *Osborne, Ward, Vassall & Co., Bristol.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1906
Nov. 13.

POWELL *v.* VICKERS, SONS & MAXIM, LIMITED.

Practice—Costs—Payment into Court—Recovery of less Amount—Costs up to payment into Court—Payment out of amount recovered—Order XXII., *r.* 6 (*c*).

If a defendant in an action for unliquidated damages denies liability, but pays money into Court, and the plaintiff proceeds with the action, and recovers from the defendant an amount which carries costs, but is less than the sum paid into Court, the plaintiff is entitled to the whole costs of the action down to payment in, and the subsequent costs of issues on which he succeeds.

The making of an order under Order XXII., r. 6 (*c*), for payment out of money paid into Court by a defendant with a denial of liability, is discretionary, but the presumption is that the amount recovered by the plaintiff should be paid out to him, and it lies on the defendant to rebut that presumption.

APPEAL from an order of a judge at chambers dismissing an appeal from an order of a Master.

The action was brought to recover damages for breach of contract by the defendants in not accepting and paying for certain goods. The defendants by their pleadings denied the contract and the breach, and they brought into Court a sum of 2500*l.* with a denial of liability. They also counter-claimed, but at the trial of the action the counter-claim was withdrawn, and the action was referred to a special referee, and it was directed that the costs of the action, reference and award should abide the event. The referee, as to the causes of action and the matters set forth in the defence and the issues joined thereon, awarded generally in favour of the plaintiff, and further awarded that the plaintiff was entitled to recover from the defendants the sum of 2265*l.* 8*s.* 6*d.* (being a less sum than the amount paid into Court), and ordered judgment to be entered accordingly. A Master thereupon made the following order: "It is ordered that judgment be entered for the defendants in pursuance of the award, and that it be adjudged that the defendants recover against the plaintiff their costs of the action, reference and award, to be taxed, and that the plaintiff recover his

C. A. 1906

POWELL v. VICKERS, SONS & MAXIM, LIMITED.

costs of the issues decided in his favour by the said award, to be taxed, such costs to be set off against the defendants' said costs; and that the money in Court do remain in Court until further order."

Against this order the plaintiff appealed, and Bucknill J. dismissed the appeal.

The plaintiff appealed.

Hugo Young, K.C., and *Tangye*, for the plaintiff. It is not disputed that the defendants are entitled to judgment. *Wheeler* v. *United Telephone Co.* (1) and *Goutard* v. *Carr* (2), reported in a note to that case, conclude that question. This gives the defendants a right to the general costs of the action, but subject to the right of the plaintiff to costs up to the time of payment into Court. In *Gretton* v. *Mees* (3) the plaintiff succeeded to the extent of the money paid into Court, and the order was that the defendant should have the costs of the action from that time. In *Buckton* v. *Higgs* (4) a similar order was made. In *Wagstaffe* v. *Bentley* (5) the order of Lawrance J. gave the plaintiffs their costs up to payment into Court, and the judgment of the Court of Appeal left that order untouched. In *Ridout* v. *Green* (6) Bruce J. made an order to the same effect as that made by Lawrance J. in the last-mentioned case. The practice is established, and there is nothing in the Judicature Acts or the Rules which in any way conflicts with it. A further objection to the order of the Master is that it directs that the money paid into Court should remain there till further order. Order LXV., r. 14, does not touch this point, for it only declares that there may be a set-off of costs between parties notwithstanding the solicitor's lien for costs. No question of set-off has arisen, for the costs in this case have not been taxed. Further, Order XXII., r. 6 (*c*), is explicit. It declares that in a case like the present one, in which the plaintiff recovers less than the amount paid into Court, the amount paid in "shall be applied, so far as is necessary,

(1) (1884) 13 Q. B. D. 597.
(2) Ibid. p. 598, n.
(3) (1878) 7 Ch. D. 839.
(4) (1879) 4 Ex. D. 174.
(5) [1902] 1 K. B. 124.
(6) (1902) 87 L. T. 679; 18 Times L. R. 709.

in satisfaction of the plaintiff's claim." There is therefore an immediate right in the plaintiff to have the amount that he has recovered paid out to him. There is no right which conflicts with this right of the plaintiff, for it does not follow that the defendants will recover a balance of costs against the plaintiff, and, even if that contingency could be taken into consideration, the effect of the order is to give the defendants a security for costs to which they cannot be entitled.

Disturnal, for the defendants. The order of the Master was right on both of the matters complained of. The Court of Appeal in *Wagstaffe* v. *Bentley* (1) were only concerned with the matters that came before them on appeal, and their judgment affords no confirmation of that part of the order of Lawrance J. which gave the plaintiffs their costs up to the time of payment into Court. The other cases cited in support of the practice which is stated to prevail are decisions in Courts of first instance, and are not binding on this Court. In *Wheeler* v. *United Telephone Co.* (2) the Court of Appeal decided, following the previous decision in *Goutard* v. *Carr* (3), that the defence of payment into Court was an alternative defence, and that where the plaintiff failed to establish damages exceeding the sum paid in the defendants were entitled to judgment, on the ground that there was one plea which went to the whole cause of action. Brett M.R., in giving judgment, said (4): "In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of the issues raised by the other alternative defences which had failed," thus expressly limiting the costs to which the plaintiff is entitled. Undoubtedly originally a plaintiff who went on with an action after payment into Court did so at the risk of getting no costs, and there is nothing in the Judicature Acts or Rules that expressly alters this condition or gives authority for the alleged practice.

As to the order that the money should be retained in Court, Order XXII., r. 6 (*c*), states that the money is not to be paid out except in pursuance of an order. There is therefore a discretion as to making an order for payment out, and it has not been

(1) [1902] 1 K. B. 124.
(2) 13 Q. B. D. 597.
(3) Ibid. p. 598, n.
(4) Ibid. at p. 613.

C. A. 1906

POWELL v. VICKERS, SONS & MAXIM, LIMITED.

shewn that the Master exercised that discretion by taking into consideration any matter which was irrelevant to his decision.

Hugo Young, K.C., in reply.

COLLINS M.R. This is an appeal from a decision of Bucknill J. at chambers, affirming an order of a Master as to the mode in which judgment should be entered in respect of costs upon the findings in an award of a special referee. The action was brought by the plaintiff to recover damages on the refusal of the defendants to accept certain goods. The defendants pleaded a denial of the contract for the sale of the goods, and they paid money into Court with a denial of liability. There was also a counter-claim for damages in respect of some goods that were delivered, but that was withdrawn at the trial, and upon that withdrawal the case was referred to a special referee, a condition of the reference being that the costs of the action and the reference and award should abide the event. The referee found all the issues submitted to him in favour of the plaintiff, and he awarded a sum of money to the plaintiff as damages, and directed that judgment should be entered accordingly. The sum awarded was less than the amount which had been paid into Court by the defendants, and in these circumstances the matter came before a Master, who entered judgment for the defendants, with costs of the action, reference and award, and directed that the plaintiff should have the costs of the issues decided in his favour, and further directed that the money in Court should remain there until further order. The plaintiff appealed and the learned judge dismissed the appeal, and against this order the plaintiff now appeals to this Court.

It is not disputed that judgment was properly entered for the defendants upon the findings in the award, but a question is raised as to the direction with regard to costs. The point taken is that the order of the Master gives to the defendants the whole costs of the action, and that it should be modified in this sense, that the plaintiff ought to have the costs of the action up to the time of payment into Court. This objection seems to me to be well founded. It appears to be the settled

practice that where money is paid into Court, with or without a denial of liability, the plaintiff, under circumstances similar to those in this case, would be entitled to costs up to the time of payment into Court. In the Annual Practice, 1907, p. 286, the rule is laid down thus: "If defendant in action for unliquidated damages denies liability but pays money into Court, and plaintiff proceeds with action there are two distinct issues raised, namely (*a*), whether the defendant is under any liability to the plaintiff; and (*b*) whether the sum paid in is sufficient to cover the liability, if any. If the plaintiff succeeds in recovering from the defendant an amount which carries costs, even though it is less than the sum paid into Court, he succeeds on the first of these issues, and is entitled to the whole costs of the action down to payment in, and the subsequent costs of the issues on which he has succeeded"; and a number of cases are cited in support of that proposition. The first of those cases, *Wagstaffe* v. *Bentley* (1), was a decision of this Court, which does not in terms decide the point as to the costs up to the time of payment in. In that case in an action to recover damages for injuries arising from the negligence of the defendants, they paid 80*l.* into Court with a denial of liability and the plaintiffs recovered 35*l.* The judgment as finally ordered was: "It is ordered that judgment be entered for the defendants, that 35*l.* be paid out of Court to the plaintiffs and 45*l.* be paid out of Court to the defendants. And it is further ordered that the plaintiffs have the costs of the action up to the time of payment into Court. The defendants to have the general costs of the action from that time, and the plaintiffs to have the costs of the issues found in their favour." There was no appeal as to the terms of that order, but a question arose as to the mode of taxation, and whether the issues of liability and amount were separate. The Court held that they were divisible, the one being whether there was negligence, and the other, given negligence, whether the payment into Court was sufficient. The Court decided that as the plaintiffs had succeeded on the first of these issues they were entitled to their costs of that issue, though they

(1) [1902] 1 K. B. 124.

C. A. 1906

POWELL v. VICKERS, SONS & MAXIM, LIMITED.

Collins M.R.

failed on the other. The case did not turn on whether the learned judge had rightly directed the entry of judgment, which stands on his authority, for nothing was said in this Court to impugn it. The matter does not stop there, for a similar question came before Bruce J. in *Ridout* v. *Green*. (1) That was an action for trespass and wrongful distraint, in which the plaintiff obtained a verdict against one of the defendants, who had paid money into Court, for a sum less than the amount paid in. The learned judge, after dealing with the decision in *Wheeler* v. *United Telephone Co.* (2) and pronouncing the decision in *Wagstaffe* v. *Bentley* (3) to be not inconsistent with that case, made an order to the same effect as that previously made by Lawrance J. in the last-mentioned case, and embodying the term that the plaintiff was to have the costs of action up to the time of payment into Court.

It seems to me that it would be very undesirable to attempt to alter the practice on this point, even if I were not satisfied that it was right. It appears to me to be a rule of practice founded on common sense, and that, unless there is some definite rule to the contrary, it should be followed. Before the Judicature Acts a plaintiff who went on with his action after payment into Court by the defendant did so at the risk, if he did not recover more than the amount paid in, of having to pay all costs. That situation arose from the express words of the Common Law Procedure Act, but now that there is no such enactment in force the matter may be decided on principles of good sense, and the plaintiff ought to have all costs up to the payment into Court, and the order of the Master will be modified, in this respect, as asked for by the plaintiff.

A further point was raised upon the part of the order that directed that the money paid in by the defendant should remain in Court till further order. It is said that the effect of this order is to defeat the provisions of Order XXII., r. 6 (*c*), which entitle the plaintiff to so much of the money paid in as will satisfy his claim. It is urged that when the facts governing the distribution of the money paid in are ascertained, it is not to be left in Court,

(1) 87 L. T. 679; 18 Times L. R. 709.

(2) 13 Q. B. D. 597.

(3) [1902] 1 K. B. 124.

but the direction is that it is to be applied so far as is necessary in satisfaction of the plaintiff's claim, and the balance (if any) is to be repaid to the defendant. I agree that the rule points to such a distribution, but the previous words of the rule should not be lost sight of, under which the money is not to be paid out of Court except in pursuance of an order of the Court or a judge. It would appear that the Master was entitled to hold the money in Court if there was any adequate reason for so doing to overweigh the presumption that it should be distributed. In this case it has been pointed out to us that there are conflicting claims for costs, and that there was no evidence before the Master as to which, when both were taxed, would out-top the other. It is also pointed out that to allow the money of the plaintiff to remain in Court would be to give to the defendants a security for costs to which they are not entitled. The onus is on the defendants to give some good reason why the money should remain in Court, and that has not been met. For these reasons I think that the order of the Master cannot be supported and that this appeal should be allowed.

FARWELL L.J. I agree. I think it impossible to construe Order XXII., r. 6 (*c*), so as to make the Court a mere machine, without any discretion to refuse an order for the payment out of money paid into Court by a defendant with a denial of liability. The provision that money is not to be paid out of Court except in pursuance of an order of a Court or a judge is intended to give a discretion to be exercised on proper occasions and materials. I do not think that the mere possibility that the defendants' costs when taxed may exceed the plaintiff's costs, on which it would seem that the Master made the order, was sufficient to justify the detention of the money.

With regard to the point as to the costs up to the time of payment into Court, I may point out that under the submission to arbitration the costs of the action and the reference were to abide the event. The parties must be deemed to have contracted to that effect on the basis of the existing practice, and I agree, for the reasons given by the Master of the Rolls, in

C. A. 1906

POWELL v. VICKERS, SONS & MAXIM, LIMITED.

thinking that the practice is correctly stated in the passage that has been read from the Annual Practice.

Appeal allowed.

Solicitors for plaintiff: *Pepper, Tangye, Young & Co., for Pepper, Tangye & Winterton, Birmingham.*

Solicitors for defendants: *Bircham & Co.*

A. M.

C. A. 1906 *Nov.* 16.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WEDNESBURY *v.* THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Local Government—Urban Sanitary Authority—Highway—Subsidence caused by Mining Operations—Action against Wrong-doer—Measure of Damages—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 10, 27.

The defendants were the owners of a mine extending under a highway which was vested, under s. 149 of the Public Health Act, 1875, in the plaintiffs as the urban sanitary authority. While lawfully working the mine the defendants let down the surface of the highway, which the plaintiffs, acting in good faith and on the opinion of skilled advisers, restored to its former level. In an action to recover damages for the injury to the highway:—

Held, that the plaintiffs, in carrying out their statutory obligation to maintain the highway, were not restricted to making a road as commodious to the public as the original road, but were entitled to restore the highway to its original level, and that the cost of so doing was the measure of the damages recoverable from the defendants.

Judgment of Jelf J., [1905] 2 K. B. 823, reversed.

APPEAL from a judgment of Jelf J. on further consideration after a trial without a jury. (1)

The plaintiffs, who were the urban authority for the borough of Wednesbury, sought to recover damages from the defendants for injury caused by their mining operations to a highway which was vested in the plaintiffs as the urban authority under s. 149

(1) [1905] 2 K. B. 823.

of the Public Health Act, 1875. It was admitted at the trial that the mining operations of the defendants had in fact caused the road and the surrounding land to subside to a considerable extent, and the question resolved itself into one of the measure of damages. The plaintiffs claimed that they were entitled to recover the cost incurred by them in restoring the road to its original level, which amounted to about 400*l.* The defendants alleged that they were not liable for the cost of restoring the road to its original level, and that it could have been rendered as commodious as before for the use of the public at a cost of 60*l.*, and they paid into Court a sum of 80*l.*, alleging at the same time that they were not liable for anything in excess of 60*l.*

The learned judge found that on the principle with regard to damages put forward by the plaintiffs, they would be entitled to recover 400*l.* and that on the hypothesis that the principle adopted by the defendants was right the sum of 80*l.* paid into Court was sufficient. He held that the proprietary right of the plaintiffs in the highway was a limited right only, and was confined to what was necessary to maintain the road as a highway, and that the proper measure of damages was not the cost of restoring the highway to its original level, but the cost of making it as commodious as before to the public. He held, therefore, that the sum paid into Court was sufficient, and gave judgment for the defendants.

The plaintiffs appealed.

Nov. 1. *Hugo Young*, K.C., and *Vachell*, K.C., for the plaintiffs. The question of law in this case is as to the true measure of damages, it being admitted that the defendants were wrong-doers in letting down the plaintiffs' road, and were liable under the Highways and Locomotives (Amendment) Act, 1878, s. 27, for the damage to it. The plaintiffs are entitled to recover the reasonable expense of reinstating the highway as nearly as possible in the same position as before. The part of the road which has been let down formerly had one uniform gradient. In consequence of the defendants' workings the road dropped in several places, and at various intervals of time, with the result that there were depressions, so that the water could not get away

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

from the road as before. The plaintiffs, as the local authority, had a right to preserve the gradient of the road as it existed before the wrongful acts of the defendants, so that the water might flow off it as before, and the expense of the maintenance of the highway might not be increased. It is a matter for their discretion whether it is necessary with these objects to reinstate the road at its original level, and it does not lie in the mouth of the defendants as wrong-doers to dictate how the injury caused by them is to be met, or to insist that the plaintiffs can and should take the course of making a new road in place of the old one, at a different level and in another position. The plaintiffs are entitled to have their road in the old position. If a landowner wrongfully diverted a highway over his land, he could not be heard to say, in answer to proceedings for an obstruction of the highway, that the substituted route was as convenient as the old one. The findings of the learned judge really only amount to a finding that the particular piece of road, if treated as suggested by the defendants, would have been as convenient for the public to travel over, but that consideration does not exhaust the subject. The question arises whether a road at the lower level may not be more onerous to repair, and whether it will be as convenient for other purposes such as drainage, having regard to the exigencies of the whole district in the future. These are matters for the exercise of the local authority's discretion in the interests of the public. The argument for the defendants assumes that it is merely the damage to the surface for which the plaintiffs are entitled to recover. But the wrong done by the defendants is the letting down of the road, which the plaintiffs were entitled to have in its old position, and in respect of that the plaintiffs are entitled to damages. The property or interest of the local authority in the road is not confined to the mere purpose of passage by the public, though no doubt the property in the subsoil is not vested in them to a greater extent than is necessary for the purposes properly incidental to the ordinary uses of a highway: see *Coverdale* v. *Charlton* (1); *Attorney-General* v. *Conduit Colliery Co.* (2); *Tunbridge Wells Corporation* v. *Baird* (3);

(1) (1878) 4 Q. B. D. 104 (2) [1895] 1 Q. B. 301.
(3) [1896] A. C. 434.

Wandsworth Board of Works v. *United Telephone Co.* (1); *Rolls* v. *Vestry of St. George, Southwark.* (2) [They also cited *Reynolds* v. *Presteign District Council.* (3)]

Montague Shearman, K.C., and *Disturnal*, for the defendants. In this case the subsidence was not only of the road, but also of the adjacent land, and what the plaintiffs have done is to raise the road again to its old position, which is now above the level of the adjacent land. It is not like a case in which a road has been let down below the level of the land on each side. There is really no analogy between this case and the suggested case of a wrongful diversion of a highway. In that case the site of the old highway still exists physically on the earth's surface, together with the right of the public to pass over it, and there is an attempted wrongful substitution of a substantially new road for the old highway. But in this case, though the position which the highway formerly occupied no doubt existed after the subsidence as a section of space, it was no longer part of the earth's surface, and there was no possibility of passing over it; and, the utmost extent of the subsidence not being more than three feet, really the road when let down remained substantially the same road as before. It was in the same position relatively to the earth's surface, though it occupied a lower position in space; for practically the general level of the road was not changed as regards the level of the adjacent land, the only mischief really being that a depression was formed on the road in a place where the water lodged, and in another place there was a small acclivity. The evidence was that, by cutting away this acclivity and other small adjustments, the road, which never, it is contended, lost its identity, could be made up in its slightly altered position so as to be for all practical purposes as convenient as before. The judge has found that, if made up as suggested by the defendants, the road would have been equally convenient as it was in its old position, both with regard to the drainage of water from it and the passage of the public over it. The measure of damages in such a case is not necessarily the cost of the complete restoration of the road to the status quo ante, but the amount reasonably

(1) (1884) 13 Q. B. D 904. (2) (1880) 14 Ch. D. 785.
(3) [1896] 1 Q. B. 604.

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

necessary to put the plaintiffs in as good a position as before the tort was committed. It did not appear in evidence that the plaintiffs had been advised that there was any real necessity for, or advantage in raising the road to the old level; in fact their own surveyor at the trial admitted the contrary. They set up an absolute right to have the road exactly as it had been before, and at the same level. It is submitted that on principle there is no absolute right to have the damages assessed on the footing that the expense of exactly reinstating the road must be allowed, even when that is unreasonable.

The rights of the plaintiffs do not extend beyond those of a private owner under similar circumstances. The measure of damages in case of a trespass to land are not the cost of restoration to its original condition, but the difference in value of the land before and after the trespass: *Jones* v. *Gooday* (1); *Hosking* v. *Phillips* (2); *Wigsell* v. *School for Indigent Blind.* (3) The interest of a local authority in a road is an interest in the surface only, so that their rights in respect of trespass are really less than those of a private owner. If it is suggested that their rights are commensurate with their duty, the answer is that their duty does not extend beyond keeping the highway in an effective state. If they go beyond that, as probably they are entitled to do, they cannot throw the excess of expenditure on the wrong-doer. The true measure of damages in this case was that adopted by the learned judge, that is, the reasonable expense of making up the road in substantially the same position relatively to the surface of the adjacent land and so as to be as convenient as formerly for the purposes of a road.

Hugo Young, K.C., in reply.

Cur. adv. vult.

Nov. 16. COLLINS M.R. read the following judgment:—

This is an action brought by an authority, in whom a highway is vested under s. 149 of the Public Health Act, 1875, for damages against the defendant company for letting down the

(1) (1841) 8 M. & W. 146. (2) (1848) 3 Ex. 168.
(3) (1882) 8 Q. B. D. 357.

highway by their mining operations. It was admitted that there was a good cause of action for substantial damages, and the only question was as to the amount.

The case was tried by Jelf J. at Birmingham, and on further consideration before him in London. At the trial the parties agreed to take the case before the judge alone.

The plaintiffs claimed to be entitled to a sum of 400*l.*, as the expense which they had actually incurred in restoring the road as nearly as possible to its original level, with the necessary retaining walls and fences, and the judge has found, as indeed the defendants admitted, that "on that hypothesis 400*l.* was a fair amount for the plaintiffs to recover." It was not suggested that the plaintiffs had acted otherwise than with perfect bona fides, and in accordance with the opinion of highly-skilled advisers, in the course they adopted, but the defendants contended, and Jelf J. adopted their contention, that the measure of damages was not what it would cost to restore the road nearly to its original level, and maintained that the highway could be made as commodious for the public as before for a sum less than 80*l.*, which they paid into Court. The learned judge held that though the plaintiffs had a proprietary right in the road, it was confined to what was necessary to maintain the road as a highway, and, it would seem, that it did not embrace the right to claim for loss of amenities to the public or the cost of restoring them. He also held that the plaintiffs, in restoring the road, had no right to consider the probability of future subsidence, or to incur any expense in adjusting their gradients with a view to such a possibility, although subsidence continued during the execution of the repairs and even reappeared after action brought. The learned judge therefore gave judgment for the defendants. The plaintiffs now appeal.

Some authorities were cited by the respondents to support the proposition that in cases of trespasses to land the measure of damage was not the cost of restoring the status quo ante, but the difference in value of the locus before and after. But those authorities, of which *Jones* v. *Gooday* (1) is the chief, obviously have no application to an action on the case by the person who

(1) 8 M. & W. 146.

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Collins M.R.

is under an obligation, as here, to make good the mischief. The damages in such a case must clearly be, not the depreciation in value attributable to the injuria, but the cost of reparation, and the question will then be, as Jelf J. thought it must be, up to what standard of reparation is the plaintiff entitled to call upon the wrong-doer to make good the cost? Now it is clearly decided in the Court of Appeal that a highway authority, in whom the soil of the road forming the approach to a bridge was not vested, had the right to raise a road which had subsided through mining operations to its original level, and gave no right of action to frontagers in whom the soil was vested, by so doing: *Atherton* v. *Cheshire County Council.* (1) In *Burgess* v. *Northwich Local Board* (2), where the authority in whom the road was vested, as here, under the Public Health Act, 1875, had raised to its former level a highway which had been caused to subside by the abstraction of salt from a bed beneath, and a question as to compensation arose between them and the frontagers, it was held that, even if more materials had been placed on the road than a surveyor of highways could justify, no action of trespass could have been maintained by the plaintiffs, that the works of the defendants were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have, and consequently that the plaintiffs were not entitled to compensation. Lopes J. makes some observations which seem to me to have an important bearing in this case. The arbitrator there had found that, though the raising of the road to the extent and in the manner described in the special case was a reasonable and prudent act on the part of the defendants, yet that such raising was not necessary to put the road in a proper state for traffic. Looking at the special case it appears that the facts which made it reasonable and prudent were that there was reason to expect continual subsidence, with the result that the trouble caused by flood water collecting in the lower parts of the road would increase, and it is to this state of facts that the observations of Lopes J. would appear to apply. He says (2): "I am inclined to think that, in determining what is the duty of the 'surveyor of highways,' the floods cannot be disregarded.

(1) (1895) 60 J. P. 6. (2) (1880) 6 Q. B. D. 264, 278.

Having regard to the circumstances stated in the case, the defendants were doing nothing more than their duty when they restored the road to the level at which it was placed in 1870. I do not think that in so raising it they were acting under the words of the 149th section of the Public Health Act, 1875, 'may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit,' but were acting under the words 'shall from time to time cause such streets to be repaired as occasion may require.' In fact, they were performing a duty as 'surveyor of highways.' . . . . They raised the road to the level at which it was placed in 1870, thinking the 'occasion' so 'required.'"

In *Tunbridge Wells Corporation* v. *Baird* (1) Lord Halsbury L.C. says, in dealing with the effect of the vesting of the street in the highway authority: "It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof." They are therefore trustees for the public of all rights and amenities incident to their property, and are not bound to forego one jot of those rights in ease of a wrong-doer, or to accept at his dictation anything different from that which they have theretofore held as such trustees for the public, still less where they are advised by competent persons that the thing substituted will not be a complete equivalent, and will involve the risk of large additional expense. What right has the wrong-doer acquired by reason of his wrong to impose his views on the trustees responsible to the public for the execution of their trust, and why should the opinion of experts, advising in his interests only, be allowed to prevail against that of those who have nothing but the public interest to consider? As to the absolute discretion of trustees as to the mode of repairing, see the recent case before Joyce J. of *Attorney-General* v. *Staffordshire County Council* (2), and the cases there cited.

In my opinion the rights of the plaintiffs in this case, so far

(1) [1896] A. C. 434, at p 437. (2) [1905] 1 Ch. 336.

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Collins M.R.

from being less than those of a private owner are at least as high, with this addition, that as trustees they have not the absolute right to renounce them that a private owner would have. In *Newcastle (Duke of)* v. *Hundred of Broxtowe* (1), an action under 7 & 8 Geo. 4, c. 31, for damages for the demolition of Nottingham Castle by a mob, it was held that, under s. 2, which directs that full compensation should be yielded to the persons damnified, the true question was, "What will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable?" (2) The jury had, in fact, given a verdict for 21,000*l.*, which was the amount named by one of the plaintiffs' experts as the cost of restoration. Referring to this, Parke J., in delivering the judgment of the Court, says in continuation of the passage cited: "There seems every reason to believe that the jury have acted on this principle; and, if so, they have done rightly." If the standard of compensation for the wrong done in this case is the same as that given by the statute in cases falling within it, it follows that the true measure here is the cost of restoration, unless the authority are in a worse position than a private owner. For the reasons I have given I think they are not. And I can see no reason why they should be bound to accept anything less than full compensation, though their remedy is one given by the common law and not by statute. Therefore, with the greatest respect to Jelf J., I think he has applied a wrong standard in measuring the damages, and that his judgment must be reversed, and instead thereof judgment entered for the plaintiffs for 400*l.* damages, less the sum paid into Court by the defendants.

COZENS-HARDY L.J. read the following judgment:—

In this case the highway, which is vested in the plaintiffs under s. 149 of the Public Health Act, 1875, has been let down by reason of the mineral workings of the defendants. The subsidence has not been uniform, but, in addition to actual damage to the surface of the road in the shape of cracks, there has been produced a series of undulations, the result of which

(1) (1832) 4 B. & Ad. 273. (2) Ibid. p. 282.

was that water could not get away from the road in the manner in which it formerly did.

The plaintiffs, acting under the advice of their surveyors and other skilled persons, have restored the road substantially to its original position, thus raising it in some places three or four feet above the present level of the adjoining land, and have sued the defendants for damages. The plaintiffs claim the cost incurred in thus raising the road. The defendants admitted liability for the subsidence due to their workings, but alleged that they were not bound to pay more than such a sum as would be required to make the road at its reduced level reasonably safe, and as convenient as formerly for traffic, with reasonable facilities for getting rid of water. Jelf J. has held that the defendants' view is correct, and that the sum of 80*l.* paid into Court by the defendants was sufficient. The plaintiffs have appealed, and claim 400*l.*, which is agreed to be the cost incurred in replacing the road.

It is, I think, important to remember that the defendants have committed a public nuisance, which might have been the subject of an indictment. "One convicted of a nuisance done to the King's highway, may be commanded by the judgment to remove the nuisance at his own costs": Hawkins's Pleas of the Crown, 8th ed. vol. i. p. 695; and indeed where the nuisance to the highway is continuing, and of a permanent nature judgment of prostration seems to have been formerly the regular form: see *Rex* v. *Pappineau* (1); *Rex* v. *Incledon.* (2) No question of damages could arise upon an indictment, and I only refer to the authorities relating to indictments in so far as they tend to shew that, for the protection of the public, the law recognized that complete restoration of the highway to its original condition ought to be exacted from the wrong-doer.

This, however, is not an indictment, but it is an action by the road authority, in whom the road is vested, against mine owners, who by virtue of s. 27 of the Highways and Locomotives Act, 1878, have a right to work mines and minerals under the road, "but so nevertheless that in such working and getting no damage shall be done to the road or highway." Although the road is

(1) (1726) 2 Str. 686. (2) (1810) 13 East, 164.

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Cozens-Hardy L.J.

vested in the plaintiffs as the road authority for some purposes only—*Coverdale* v. *Charlton* (1)—I think it is plain that they have a sufficient interest to maintain this action without the Attorney-General being a party. In the ordinary case of a landowner, whose surface is let down by reason of mineral workings, the measure of damages is the diminution in the selling value, and not the cost of replacement or abatement: see *Tunnicliffe & Hampson* v. *West Leigh Colliery Co.* (2) and cases there cited, and *Jones* v. *Gooday.* (3) But I fail to see how any such standard can be reasonably applied in a case like the present, where the plaintiffs have no power to sell the road, and where, moreover, it is not competent for them to accept a sum of money in satisfaction for a public nuisance. I have not been able to discover any authority directly in point, and it is necessary to consider the case on general principles.

Now it is not easy to see what right a wrong-doer can have to suggest the best or the most reasonable mode of remedying the wrong done. It is clear that a man who obstructs a highway cannot say, "True I have damaged the old road, but I have provided a new road, which is equally convenient or more convenient." The defendants try to escape from this position by contending that the result of the expenditure of 80*l.* would not have been the formation of a new road, but only a repair and improvement of the old road, and that the identity of the old road is not lost by reason merely of the depression of the surface. I am not satisfied that this contention is sound, but I prefer to base my judgment upon a different ground. The plaintiffs are a public body to whom, and to whom alone, is entrusted the duty of maintaining and repairing this highway. The road is vested in them in order to enable them the better to discharge this duty. When Parliament has entrusted a public body with definite powers and duties it is proper to assume that their action, based upon the opinion of their skilled advisers as to what ought to be done, is reasonable, and it is not in accordance with the practice of the Court to allow the propriety of such action to be questioned unless an issue of want of good

(1) 4 Q. B. D. 104. (2) [1906] 2 Ch. 22.
(3) 8 M. & W. 146.

faith is distinctly raised. [The Lord Justice then examined the evidence of the experts called at the trial, and continued:—] Now if it is right for me to weigh this testimony, I must say that I prefer the evidence of the plaintiffs' witnesses. They took into account, as they were entitled to, the probability of further subsidences, and it was scarcely disputed that the defendants' proposal would not be satisfactory in that contingency. But I doubt whether I ought to weigh this evidence. No attempt was made to attack the good faith of the plaintiffs or their skilled advisers, and under these circumstances I think I ought to hold that the plaintiffs, in the discharge of their statutory duty, did what was perfectly reasonable in restoring the road to its old level, and that the cost of so doing—that is to say, 400*l.*—is the proper measure of damages. Jelf J. seems to have considered that a road authority, whose rights to the soil are limited, must be in a worse position than a private owner, whose rights to the soil are unlimited. With great respect to the learned judge, I think the position of the road authority with reference to a wrong-doer is not worse, but better, inasmuch as the rights of the public, of which the road authority is the guardian, are involved. For these reasons I think that the appeal must be allowed.

FARWELL L.J. read the following judgment:—

The plaintiffs are the highway authority in whom a public highway known as Dangerfield Lane, in Staffordshire, is vested by the Public Health Act, 1875, s. 149, and they have, under s. 144, all the powers, authorities, duties and liabilities of surveyors of highways, so far as not inconsistent with the provisions of that Act, and they can be compelled by the county authority (now the county council) to perform this duty of maintaining and of repairing the highways within this district: see s. 10 of the Highways and Locomotives (Amendment) Act, 1878.

The mines and minerals under the road are not vested in the plaintiffs by the Public Health Act, but are reserved to the mine owners, who have the same powers of working and getting the mines as if the road had not become vested in the plaintiffs, but so nevertheless that in such working and getting no damage

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Farwell L.J.

shall be done to the road or highway: the Highways and Locomotives (Amendment) Act, 1878, s. 27.

Questions have arisen in many cases as to the extent to which the subsoil under the roads has passed to the local authority, of which *Tunbridge Wells Corporation* v. *Baird* (1) is a good instance, but it is in my opinion clear that at any rate the surface of the street, and so much of the actual soil of the road as may be necessary for its preservation as a road, are vested in the local authority. Further, I am of opinion that in respect of the property so vested in them they have, as owners thereof, at least the same rights of action in respect of trespass, and of a nuisance damaging their property, as a private owner would have, and in saying this I am following Wills J. and Vaughan Williams J. in *Attorney-General* v. *Logan*. (2) Not only do they possess these rights, but they are under a statutory obligation, and may be compelled to enforce them. The plaintiffs have therefore both the power and the duty to maintain and repair the highway, and thus the concurrence of the Attorney-General is not necessary. If Jelf J. intended, by his reference to the absence of the Attorney-General as a party, with the result that "the plaintiffs can only recover what they have suffered without regard to any ulterior disadvantages to the public," to say that the duty owed by the plaintiffs to the public, and their liabilities under s. 10 of the Highways and Locomotives (Amendment) Act, 1878, are to be disregarded, I cannot agree with him. A private individual cannot sue for an obstruction on the highway unless he has thereby suffered special damage: he can sue only in respect of his own individual rights peculiar to himself and not common to the rest of the public, because he is not the custodian or guardian of public rights; but the case of the local authority having the highway vested in them, and with statutory duties to perform in respect thereof, is entirely different by reason of the existence of that estate, and of those duties, the lack of which disentitle the individual to sue.

Jelf J. has not held nor have counsel suggested that the plaintiffs could not sue at all, but, admitting their right to sue, the learned judge has limited the extent of their power to recover

(1) [1896] A. C. 434. (2) [1891] 2 Q. B. 100, at pp. 104, 105.

damages in a way that I am unable to follow. The defendants are mere wrong-doers; they have without right or justification let down the highway, and have no defence to this action; the only question is one of the measure of damages. The plaintiffs have restored the road substantially to its former level and condition, and they contend that the cost to which they have been put in doing this is the amount recoverable by them from the defendants. The defendants say that the road at the lower level, with different gradients, and with a depression sinking to three feet or so at the deepest and rising again, could have been put in good repair for 80*l.* or less, and that they are not liable for more.

Now the defendants have been guilty of an offence for which they could have been successfully indicted; they have obstructed the highway by letting it down and by injuring its surface; it is quite immaterial that they have done it by working their own land below the road; the offence would be the same if they had dug it out with spades and pickaxes to the same extent from above; the obstruction consists in excavating and altering the level of the highway. It is no defence to such an indictment to shew that the obstruction is on part of the road not ordinarily used for public traffic, and that sufficient space for all practical purposes has been left: *Reg.* v. *United Kingdom Electric Telegraph Co.* (1), nor that the obstruction, although a nuisance, gives countervailing advantages to the public: *Rex* v. *Ward.* (2)

The usual judgment on such an indictment was to order the wrong-doer to abate the nuisance, e.g., if he had put a spoil-bank on the road—to remove it, or if he had dug a hole in it—to fill it up. So much a matter of course was this that in *Rex* v. *Pappineau* (3) it was argued that an order was bad for omitting such a direction; and in *Rex* v. *Incledon* (4) it was treated as a matter of course that the order should contain such a direction, and Lord Ellenborough did not dispute this, but refused to make the order on the ground that the wrong-doer had already made good the injury. In addition to this remedy by indictment, and to civil actions by any member of the public who has suffered special damage by the obstruction, the wrong-doer is

(1) (1862) 31 L. J. (M.C.) 166.
(2) (1836) 4 Ad. & E. 384.
(3) 2 Str. 686.
(4) 13 East, 164.

C A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Farwell L.J.

liable to be sued by the highway authority for the invasion of their rights as owner of the surface, and for injury to the highway, the duty of maintaining and repairing which is imposed on them, and for an injunction.

It was argued for the defendants that the measure of damages in such an action is not the cost of making good the damage, but the difference between the saleable value of the property before and that after the injury. Such a principle has no application to property which cannot be sold, but is vested in a public body, with the duty of maintaining it for public purposes: in such a case there is no saleable value by which to measure. Moreover, the plaintiffs do not merely sue in trespass in respect of their property in land, but in case, as a public body, for nuisance causing injury to the public, the duty of abating which is cast on them. The actual pecuniary loss sustained by the plaintiffs, which is one of the usual ways of stating the measure of damages, is the amount it has cost them to fulfil that duty, i.e., in the present case 400*l*. Another ground on which the plaintiffs' claim may be supported is that the 400*l*. is money paid by them in discharge of a legal liability to make such expenditure, and it is immaterial that the payment has not been made under compulsion of an actual judgment or order: the liability to pay is sufficient: *Randall* v. *Raper*. (1)

The importance in this respect of the existence of public duties in the plaintiffs is illustrated by a case of *Manchester Ship Canal* v. *Rochdale Canal* (2), where the plaintiffs, whose water had been abstracted and sold by the defendants, proposed to waive the tort, and claim profits instead of damages, but were not allowed to do so, on the ground that they had statutory duties to the public in respect of this canal, and could not affirm acts which were illegal, not only against themselves but against the public.

It was then urged that the liability was confined to the amount necessary to put the road into good repair, i.e., that the defendants are liable only in damages for breaking the surface, not for lowering the level of the road; and this is the view adopted by Jelf J. I am unable to agree with it. The fallacy consists in the use of the words "the road," and in assuming, as counsel

(1) (1858) El. B. & E. 84; 27 L. J. (Q.B.) 266. (2) (1899) 81 L. T. 472.

for the defendants insisted, that the road at its present level is the same road as the road at its former level. Unless to walk up a slope and down a slope is the same thing as to walk on the level, or unless the chord of an arc is equal to its curve, I fail to see how the altered road can be the same as the old road. It is certainly not so physically, and it is not so in point of law. Thus in *Burgess* v. *Northwich Local Board* (1) the plaintiff, an owner of land adjoining a highway, claimed compensation from the local authority, under the Public Health Act, 1875, s. 308, for the cost of raising his house, which had become necessary by reason of the raising of the highway by the defendants to the level from which it had recently sunk. The plaintiff failed, and Lindley J. says (1): "If the plaintiffs could shew that the highway had been dedicated to the public at the level at which it accidentally sank, they would have had a right of access at that level, and a right of action if that level was altered to their detriment. The plaintiffs' right of access to the road when it was sunk is not open to controversy; but I can find neither principle nor authority for saying that they had a right to have the road which had recently accidentally sunk maintained at the level to which it had so sunk. Unless, however, they had such a right, they are not in a position to maintain that any right of theirs was infringed, if the road is raised to the height at which it was before it subsided." In the present case the learned judge has found as a fact that the lowered road is as convenient for the public as the former road; but he had already found, or it was admitted, that the defendants had been guilty of a nuisance; he cannot therefore mean that the alteration is so trivial as to be inappreciable, for if he had he must have found "no nuisance," but having once found that it was a nuisance, then on the point of damages this question of relative convenience is not, in my opinion, open to him.

The public authority in whom the road is vested, and on whom is cast the duty of maintaining it, is the proper judge of such a question, and the Court ought not to interfere with it, except in a case of mala fides pleaded and proved. It has been held in the Court of Appeal—*Atherton* v. *Cheshire County Council* (2)—

(1) 6 Q. B. D. 264, 275. (2) 60 J. P. 6.

C. A. 1906

WEDNESBURY CORPORATION v. THE LODGE HOLES COLLIERY COMPANY, LIMITED.

Farwell L.J.

that an adjacent owner, whose land has been let down with the road, has no right to restrain the highway authority from raising the road to its old level, and if an innocent adjacent owner, who will suffer from the restoration of the road to its old level, cannot interfere with the exercise of the discretion of the local authority, still less has the wrong-doer who has let down the road any such right. His contention is that he has done wrong not merely to the highway authority but to the adjacent owners, and that, in consequence of the wrong to the latter, he ought not to pay to the former for restoring the road, because it will not be so convenient to the adjacent owners, but as this convenience or inconvenience gives no right to the adjacent owners, still less can it give any to the wrong-doer.

Counsel for the defendants drew a graphic picture of a highway running as a sort of elevated railway, raised to a level above furnaces and chimneys by road authorities restoring the level of roads as they were when first made, or at any rate macadamized: but we have not to deal with any such state of things; if any such arose, and the road authority sought to make a mineowner, who had let down the road to the extent of a few feet from the level at which it had been for years, restore it to the level at which it was a century ago, it might well be that the defendant might successfully plead and prove that such a demand was not made bona fide, but he would have to plead it and prove it. Want of bona fides is not proved by a mere balance of convenience in the face of such evidence as the plaintiffs have adduced in the present case, and which has already been referred to by Cozens-Hardy L.J.

In the present case mala fides, although suggested at the bar in this Court, has neither been pleaded nor proved, nor has Jelf J. rested his judgment on any such ground.

In my opinion the true measure of damages in this case is 400*l.*

Appeal allowed.

Solicitor for plaintiffs: *Thomas Jones, Wednesbury.*

Solicitors for defendants: *Bower, Cotton & Bower, for Thursfield and Massiter, Wednesbury.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1906
Nov. 9, 10, 19, 30.

GOLDSMITHS' COMPANY *v.* WYATT.

Plate—Assay—Hall Mark—Watch-cases—Foreign Watches — Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59.

Gold and silver watch-cases, forming parts of finished watches imported into the United Kingdom from abroad, are gold and silver plate within the meaning of the Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59.

So *held*, reversing the judgment of Channell J., [1905] 2 K. B. 586.

Appeal from the judgment of Channell J. upon a case stated in an action.

The action was brought by the plaintiffs for the King and for themselves for : (1.) 40*l.* for penalties under the Customs Act, 1842 s. 59, and 12 Geo. 2, c. 26, in respect of the sale and exposing for sale of certain gold and silver watch-cases—to wit, two gold watch-cases and two silver watch-cases of foreign manufacture imported into the United Kingdom of Great Britain and Ireland from foreign parts since the commencement of the said Customs Act, 1842, which said gold and silver watch-cases were sold and exposed for sale in England before the same had been assayed, stamped, and marked as alleged to be required by the said Customs Act, 1842, and the Hall Marking of Foreign Plate Act, 1904; (2.) a declaration that the said gold and silver watch-cases were respectively gold and silver plate within the meaning of ss. 59 and 60 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall Marking of Foreign Plate Act, 1904. Pursuant to an order of a Master the following case had been stated for the opinion of the Court :—

1. The plaintiffs are the Wardens and Commonalty of the Mystery of Goldsmiths of the City of London, who are and have been a guild and corporation time out of mind, with divers privileges confirmed and enlarged from time to time by divers statutes and by several charters, amongst other things, for the searching, assaying, marking, and regulating wrought plate in order to ascertain the standard thereof for the good and safety of the public.

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

2. The defendant is William Wyatt, carrying on business as a watchmaker, jeweller, and dealer in plate at No. 198, Ebury Street, Eaton Square, in the county of London.

3. On March 14, 1905, four watches, of which two were in silver watch-cases and two in gold watch-cases, were exposed for sale by the defendant at his said shop, and were then and there sold by him to one Sir Walter Sherburne Prideaux, an agent of the plaintiffs. The said watches have been marked and numbered respectively 1, 2, 3, and 4.

4. None of the said four watch-cases are battered within the meaning of s. 59 of the Customs Act, 1842, nor are they richly engraved, carved, chased, or set with jewels or other stones, and they are each and all of them of foreign manufacture, and have been imported into the United Kingdom of Great Britain and Ireland since the commencement of the Customs Act, 1842 (5 & 6 Vict. c. 47).

5. None of the said four watch-cases were wrought or made prior to the year 1800.

6. In the opinion of the Commissioners of Customs none of the said four watch-cases may be properly described as hand-chased, inlaid, bronzed, or filigree work of an Oriental pattern. The watch-case forming part of the said watch No. 3 is not incapable of receiving the marks referred to in the statute 12 Geo. 2, c. 26, or any of such marks by reason of the smallness or thinness thereof.

7. None of the said four watch-cases so exposed for sale and sold on March 14, 1905, as aforesaid, at the time of the said exposure for sale and sale, had been assayed or stamped and marked with the marks of the said plaintiffs or with the marks of any other duly authorized assay office in the United Kingdom of Great Britain and Ireland.

8. The said four watch-cases have been weighed and assayed. No. 1 weighs 11 dwts. 7 gns., and is of a standard less in fineness than 11 ozs. 2 dwts. of fine silver in every pound weight troy. No. 2 weighs 10 dwts., and is of a standard greater in fineness than 11 ozs. 2 dwts. of fine silver in every pound weight troy. No. 3 weighs 2 dwts. 3 gns., and is approximately of a standard in fineness of fourteen carats of fine gold in every pound weight troy, but

has a dome and bow of base metal; and No. 4 weighs 11 dwts. 10 gns., and is of a standard in fineness of eighteen carats of fine gold in every pound weight troy. All the said watch-cases bear Swiss Government hall marks indicating the true standard of gold or silver employed in their manufacture and agreeing with the above-mentioned assays, and the dome of the watch-case No. 3 bears the mark "cuivre," denoting that the same is of base metal. (1)

10. No legal proceedings have been instituted by the plaintiffs since the year 1842 in respect of the sale and exposing for sale of foreign watch-cases forming part of watches imported into the United Kingdom of Great Britain and Ireland and sold or exposed for sale before the same have been assayed, stamped, and marked.

12. Gold and silver watch-cases forming part of gold and silver watches imported into the United Kingdom of Great Britain and Ireland since the passing of the Revenue Act, 1883, have not been entered to be warehoused nor deposited in a bonded warehouse, but have been delivered for home use before they have been assayed, stamped, and marked.

13. All highly finished articles of foreign plate, after being assayed, stamped, and marked by an assay officer, have to go back to the shop for the marks to be "set" and "finished" before such articles can be placed on the market. The assaying, stamping, and marking of British-made watch-cases are invariably performed while the cases are in the rough and before they are polished, and before the movements are inserted therein. Foreign-made watch-cases are now never imported into the United Kingdom without being made up into finished watches, but formerly such cases when intended to be assayed and marked were, like British watch-cases, sent to the assay offices in an unfinished state, and were subsequently "finished."

The points of law raised by the special case for the opinion of the Court are: (1.) Whether the said gold and silver watch-cases forming part of the said watches are respectively gold and silver plate within the meaning of ss. 59 and 60 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall Marking of

(1) It has not been thought necessary for the purposes of this report to set out paragraphs 9 and 11 of the special case.

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

Foreign Plate Act, 1904; (2.) whether upon the facts set out in the special case and agreed between the parties the defendant is liable to penalties under the Customs Act, 1842, which penalties are defined by the statute 12 Geo. 2, c. 26, in respect of the sale and exposing for sale of any one or more of the said gold and silver watch-cases.

The learned judge gave judgment for the defendant. (1)

Nov. 9, 10, 19. *J. Eldon Bankes, K.C.*, and *Graham Campbell*, for the plaintiffs. It was in effect admitted on the part of the defendant in the Court below that a gold or silver watch-case, imported separately without any works in it, would be "plate" within the Customs Act, 1842, s. 59, but it was contended that, if imported as part of a completed watch, such a watch-case was not "plate" within that section. The learned judge decided in favour of that contention, but it is submitted that the view taken by him is fallacious. There has been a long series of enactments in this country, the object of which was, for the protection of the public, to insure that articles and wares of gold and silver, made and sold in this country, should be of certain standards of fineness by providing for the assaying and marking of such articles. In reference to this object it is immaterial whether the article of gold or silver is or is not combined with some other article or material. If the object is that gold and silver articles sold should be up to a certain standard, why should that not apply to a case where such an article forms part of another article, as in the case of a watch-case or of the silver top of a scent-bottle? The learned judge dwells upon the fact that, in the case of a completed watch, the value of the case may bear a small proportion to that of the works, but it is submitted that the test so applied is really irrelevant. It treats the contention for the plaintiffs as if it were that the watch, as a whole, is "plate" within s. 59 of the Customs Act, 1842, whereas their contention is that the gold or silver watch-case is plate within that section, whether it has works in it or not. The term "gold or silver plate" is used in s. 59 as a generic term to include all that was covered by the words "ware, vessel,

(1) [1905] 2 K. B 586.

plate, or manufacture of gold or silver" in the enactments with regard to the assaying and marking of gold and silver articles of English manufacture contained in 12 Geo. 2, c. 26, the object being that the same provisions should apply to such articles, when made abroad and imported into this country, as would have applied if they had been made in England. That this is so is shewn by the proviso to the section which provides that no "article or ware of gold or silver so to be imported shall be liable to be assayed, stamped, or marked as aforesaid, which would not be liable to be assayed, stamped, or marked if it had been wrought or made in England." The language of that proviso shews that "gold or silver plate" is used in the section as meaning the same as "article or ware of gold or silver." The enactments relating to the assaying and marking of articles of gold and silver, beginning with 28 Edw. 1, use a variety of terms such as "ware," "manufacture," "wrought plate"; but from the first the subject of their provisions was the manufactured metal, and the term "gold or silver plate" is used as a compendious term including all that is the subject of such provisions. In some cases other words are for special reasons used in addition to "gold or silver plate," but it is contended that the purview of the enactments shews that the effect of this is not to limit the scope of those words where used alone as a generic term.

The Act 12 Geo. 2, c. 26, recited the Act of 28 Edw. 1, which forbade the making of any vessel, jewel, or other thing of gold or silver unless of a certain standard, and provided for the assaying of such articles, and the Act 2 Hen. 6, c. 14, which concerned the fineness of harness of silver, and the marks with which it should be marked, and provided that no goldsmith or worker of silver within the city of London should sell any workmanship of silver unless of a certain fineness. Sect. 1 of 12 Geo. 2, c. 26, provided that no goldsmith, silversmith, or other person whatsoever, making, trading, or dealing in gold or silver wares in England, should work, make, or cause to be wrought or made or sell any gold vessel, plate, or manufacture of gold whatsoever less in fineness than twenty-two "carracts" of fine gold in every pound weight troy, nor any silver vessel, plate, or manufacture

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

of silver whatsoever less in fineness than 11 ozs. 2 dwts. of fine silver in every pound weight troy. It does not follow, as suggested, from the use of the other words "vessel" and "manufacture" in conjunction with "plate" in this Act that the word "plate," when used alone therein or in s. 59 of the Customs Act, 1842, must have a more limited meaning; because in later sections of the Act 12 Geo. 2, c. 26, the word "plate" is in many cases obviously used in a sense which must be taken to include all that was included in the expression "vessel, plate, or manufacture" in s. 1. Sect. 5, for instance, after providing that no "gold or silver vessel, plate, or manufacture of gold or silver whatsoever" shall be sold or exposed for sale before it is marked, uses in describing the mark to be employed the expression "year in which such 'plate' shall be made." Sect. 9 also provided that every goldsmith or silversmith making any gold or silver vessel, plate, or manufacture of gold or silver, shall send to the assay office with every parcel of such gold or silver a note or memorandum containing, among other things, "all the species in such parcel of 'plate.'" Sect. 13 provided that, for assaying "any piece or parcel of wrought plate of gold or silver," the sums thereafter specified should be payable, and then proceeded to fix the sum payable in respect of gold and silver watch-cases and a number of other articles which would not be included in the ordinary meaning of the word "plate." In s. 18 and in s. 20, which prescribed during what hours the assay office should be kept open for the taking in "plate," it is obvious that the word "plate" must be used as embracing all that was included in the words "vessel, plate, or manufacture" in the earlier sections. In the enactments 8 & 9 Will. 3, c. 8, s. 9, and 12 & 13 Will. 3, c. 4, s. 9, also, the word "plate" was clearly used in the same comprehensive sense as a generic expression. The Act 25 Geo. 3, c. 64, s. 5, contained the expression "if such plate shall consist of watches." Again, the Act 38 Geo. 3, c. 24, which repealed the duty imposed by an earlier Act on watches, is intituled an "Act to repeal the duties on gold and silver plate used in watch-cases." The Act 44 Geo. 3, c. 98, which granted duties on various articles, mentions in Sched. B "plate of gold" and "plate of silver" which shall be made or wrought in

Great Britain, and which ought to be assayed and marked therein, and contains a special exemption of watch-cases and other articles. If a watch-case by itself is plate within the meaning of the section, it is impossible to suppose that it can cease to be plate because works are inserted in it.

Sir R. B. Finlay, K.C., and *Newbolt* (*Sebastian* with them), for the defendant. The question is whether a case forming part of a finished watch is "plate" within the meaning of the section. This case is not concerned with the question whether a gold or silver watch-case imported without works in it would come within the section. A good many of the arguments derived by the counsel for the plaintiffs from the legislation on the subject which has been referred to might perhaps apply to such a watch-case as last mentioned, but, it is submitted, do not apply to such an article as a finished watch. In the first place, it may be observed that, in the ordinary use of language, no one would speak of a finished watch, or the case forming part of it, as "plate." The question is what effect is to be given to the word "plate" in ss. 59 and 60 of the Customs Act, 1842. Upon the doctrine of "contemporanea expositio" some weight ought to be given to the construction which has always been in fact put by those concerned on an Act passed as long ago as 1842. Since the passing of the Act finished watches and their cases have never been treated as coming within the term "plate" as therein used; and, after the repeal of the duty which formerly existed on watches, it was never suggested that they were liable to the duty on plate, which was not repealed till 1890. Sect. 59 of the Act of 1842 uses the words "ware, vessel, plate, or manufacture of gold or silver" in one part of it, and, according to the ordinary rules of construction, some effect ought to be given to the fact that, though that is the case, in the enacting part of it only the words "gold or silver plate" are used. If the Legislature had intended the enactment to apply to all that is covered by the words "ware, vessel, plate, or manufacture of gold or silver," why should they not have used those words? The list of articles subject to duty under the Act in the schedule mentions under Class VI. "plate of gold" and "plate of silver," and under a different class, namely, Class XIX.,

C A. 1906

GOLDSMITHS' COMPANY v. WYATT.

"watches of gold or silver," thus shewing that in some parts of the Act the term "plate" does not include finished watches. The Legislature in s. 59 naturally, in referring to the enactment of 12 Geo. 2, c. 26, used the expressions found in that enactment, namely "vessel, plate, or manufacture of gold or silver," but they carefully restrict the application of the provisions of that Act in s. 59 to "gold or silver plate" imported from abroad. The reasonable inference is that, by the phraseology used, they meant to restrict the application of the section to gold and silver plate in a narrower sense. Plate in its ordinary meaning does not include such articles as a watch-case forming part of a watch, or the gold or silver handle of an umbrella. It may be that in various sections of 12 Geo. 2, c. 26, the word "plate" must necessarily be construed as being used as a convenient generic term to include all the matters coming within the Act, but the same consideration does not apply to s. 59 of the Act of 1842. The provisions that have been cited from previous Acts with reference to the imposition of duties on plate and watches really throw no light on the meaning of an enactment relating to the assay and marking of gold and silver articles. The requirements of the Act can only be complied with as regards watch-cases before works are inserted. A finished watch cannot practically be assayed and marked under the provisions of the Act. [They cited *Ohlson's Case*. (1)]

J. Eldon Bankes, K.C., for the plaintiffs, in reply. No such inference as suggested can be drawn from the special mention of watches in the schedule of duties in the Act. That is a part of the Act relating to duties, and the object was to put a higher duty on finished watches.

Cur. adv. vult.

Nov. 30. The judgment of the Court (Collins M.R., Cozens-Hardy L.J. and Farwell L.J.) was delivered by

FARWELL L.J. The question in this case is whether gold and silver watches imported from abroad as completed articles must be assayed and stamped by the Goldsmiths' Company under s. 59 of 5 & 6 Vict. c. 47. It is not disputed that such watches, if made

(1) [1891] 1 Q. B. 485.

in the United Kingdom, and that watch-cases of gold and silver, if imported into the United Kingdom without works, must be so assayed and stamped; but it is contended, and Channell J. has held, that the completed article is under no such liability. The question depends upon the construction of s. 59 of the Customs Act, 1842, a section which has nothing to do with Customs, but is in fact, although not in name, an amendment or extension of the existing Act for preventing frauds and abuses in gold and silver ware, 12 Geo. 2, c. 26.

The prevention of adulteration of gold and silver, and the preservation for that purpose of a fixed standard of these metals, authenticated by test and mark, have been the subject of divers statutes from an early date. The Act of George II. recites statutes commencing with the 28th of Edward I., and states in its preamble that "The standards of the plate of this kingdom are both for the honour and riches of this realm and so highly concern His Majesty's subjects that the same ought to be most carefully observed and all deceits therein to be prevented as much as possible." Sect. 1 forbids in England the working or making of any gold or silver "vessel, plate, or manufacture of gold or silver" of less than a fixed fineness. Sect. 2 excepts jewellers' work, namely, gold or silver wherein any jewels or other stones are set, jointed night-earrings of gold, and gold springs of lockets. Sect. 5 forbids the sale or exportation of "any gold or silver vessel, plate, or manufacture of gold or silver" until it has been marked with the Goldsmiths' marks. Sect. 6 excepts a number of small articles such as rings, sleeve-buttons, rims of snuff-boxes, stoppers to glass bottles and the like, and also "any gold or silver vessel, plate, or manufacture of gold or silver so richly engraved, carved, or chased, or set with jewels or other stones as not to admit of an assay to be taken of or a mark to be struck thereon, without damaging, prejudicing, or defacing the same." Sect. 8 imposes a penalty on (amongst other things) marking with any counterfeit mark "any wrought plate of gold or silver whatsoever." Sect. 9 recites that great frauds are daily committed by the private working of "silver plate," and provides that every working goldsmith or silversmith who shall work "any gold or silver vessel, plate, or manufacture

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

of gold or silver whatsoever" by the Act required to be marked shall send with every parcel of such gold or silver a memorandum containing the date, name and abode of worker, and "all the species in such parcel of plate and the number of each species." Sect. 11, after reciting that it may be necessary to use a greater quantity of soder in or about one piece of wrought plate than another, provides that the wardens shall determine what soder is necessary in or about "every piece of plate which shall be brought or sent" to the assay office to be marked. Sect. 13 recites that the Goldsmiths' Company have for many years been at great expense in assaying and marking "wrought plate," and "the same hath of late years very much increased by their assaying and marking several sorts of small wares of gold and silver which were not heretofore usually assayed and marked, and of which there are much greater quantities now made than were heretofore made," and proceeds to authorize certain charges on "any piece or parcel of wrought plate of gold or silver" not exceeding (amongst others) "for assaying, trying, and marking gold watch-cases or gold watch-boxes" 10*d.* a piece. And s. 20 provides for the hours during which the assay office shall be kept open "for the taking in plate," and, "if any parcel of plate" be found to be of coarser alloy than the proper standard, the Goldsmiths' Company are authorized to break and deface "such parcel of plate."

It is reasonably clear that "plate" is used in this Act in two distinct significations—(1.) when used in conjunction with "vessel or manufacture of gold or silver," it means dish or platter as contrasted with cup or bowl; (2.) when used by itself, it connotes "plate" as a genus including as species vessel, dish, and every other form of gold or silver manufacture except the jewellers' work mentioned in s. 2, and the rings and other articles mentioned in s. 6, but including articles so far removed from any ordinary meaning of "plate" as watch-cases, snuff-boxes, hooks for watch-chains, and buckles. It is not, nor could it be, contended that the insertion of works within a watch-case could take it out of this Act nor that composite articles do not come within the Act; the provisions of s. 11 are alone enough to shew that the Act extends to composite articles. The construction of this Act is

important, because in our opinion the principle laid down by Lord Mansfield in 1758 in *Rex* v. *Loxdale* (1) is as sound now as it was then, and it has often been acted upon by the Courts, e.g., in *Smith* v. *Brown*. (2) Lord Mansfield says: "Where there are different statutes in pari materia, though made at different times or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other." Now s. 59 of 5 & 6 Vict. c. 47 obviously refers to and extends the Act of George II., although it does not mention it in express terms, and although all the other sections of the later Act relate to different matters. The Act is professedly a Customs Act, but it relates to other matters—e.g., s. 39 extends an Act regulating the admeasurement of merchant shipping. The object of s. 59 is to extend the provisions of 12 Geo. 2, c. 26, with respect to assaying and marking to gold and silver plate (not being battered) imported from foreign parts; and in such a section it is reasonable to expect that, if the Legislature has adopted the phraseology of the earlier Act, it intends that such phraseology shall have in the later Act the same meaning that it bears in the earlier. We have already shewn that "plate" when used by itself in the earlier Act, and not in collocation with "vessel, or manufacture of gold or silver," connotes the genus "plate"; and when we find "gold and silver plate" and "ware, vessel, plate, or manufacture of gold or silver" in s. 59 of the later Act, we conclude that the same meanings are to be attached to them as in the earlier Act. This is borne out by the proviso at the end of s. 59; the Act of George II. excepted a number of small articles under ss. 2 and 6, which but for the exception would have fallen into the category of "plate," and s. 59 follows this by first providing for the stamping of plate and then excepting from that category the same articles that are excepted therefrom in the earlier Act.

Reference was made by Sir Robert Finlay to the schedule which contains a list of articles on which Customs duties were imposed and the amount of such duties, and reliance was placed on the fact that plate appears in Class VI. and gold and silver

(1) (1758) 1 Burr. 447. (2) (1871) L. R. 6 Q. B. 729.

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

watches in Class XIX. as different articles; but this is not material. The tables refer to s. 40, and are for the purpose of taxation; s. 59 is for a different purpose altogether, and we think that neither the Customs clauses and tables in this Act, nor any of the numerous other Customs Acts cited to us, have any bearing on the construction of s. 59. Lord Mansfield's principle is expressly confined to Acts in pari materia, and it would be especially dangerous to apply phrases in taxing Acts, where for the purpose of increasing revenue words are often given by definition in the Act a wide and unusual signification, to statutes relating to other purposes.

Finally, it is apparent from the Acts referred to above, and specially from the preamble to 12 Geo. 2, c. 26, that the aim and object of the Legislature was to set up and preserve standards for all gold and silver manufactured articles in England (with the exception of the small articles already mentioned); and it is difficult to find any ground on which it can be suggested that the Legislature meant imported gold and silver watches to be excepted, when it is admitted that gold and silver watch-cases must be stamped, and the more so because it is not a question of taxation, but of preserving uniform standards for all manufactured articles of gold or silver in the kingdom. It was suggested that foreign watches could not be assayed and stamped after they were completed, but the facts stated in the special case do not amount to this, and we apprehend that it is a mere question of convenience.

One or two points urged by counsel and mentioned in the judgment of Channell J. remain to be noticed. It is said that no one would use "plate" as including gold and silver watches in common parlance. We are not concerned to dispute this, but the question is not of the meaning of the word "plate" in ordinary language, but in Acts of Parliament, where it undoubtedly includes gold and silver watch-cases. If a gold or silver watch-case is "plate," we fail to see why the insertion of works makes it any less "plate" than it was before such insertion; it is "plate" by reason of the gold or silver metal in it, and the metal is unchanged whether the article remains a watch-case or develops into a watch.

It was urged that there had been an uniform practice since 5 & 6 Vict. of treating watches imported from abroad as exempt from assay. The special case states no such usage. The facts set out (paragraphs 10 to 13) fall far short of it. But in our opinion the principle of "contemporanea expositio, &c.," cannot be applied to so modern a statute. Lord Watson has expressed the true view in *Clyde Navigation Trustees* v. *Laird*. (1) He there says: "I have only to add that, in my opinion, such usage as has in this case been termed 'contemporanea expositio' is of no value whatever in construing a British statute of the year 1858." (His Lordship was speaking in 1883.) "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken." The utmost that could be said in the present case (if the facts stated amount to usage) would be, as Lord Blackburn suggests in the same case (2), that any Court would be cautious and not decide unnecessarily against it. The only authority referred to by Sir Robert Finlay was a dictum of Stephen J. in *Ohlson's Case* (3), but we doubt if he intended to say anything more than is expressed by Lord Blackburn above. The argument that traders have embarked in business on the strength of this usage is not supported by any facts set out in the special case, and would be disposed of, if alleged, by *Feather* v. *The Queen*. (4)

The Merchandise Marks Act, 1887, was referred to, but it is not in pari materia. The compulsory identification of foreign-made articles as such has no connection with the standard of gold and silver articles imported into this country.

With all respect, therefore, we are unable to agree with

(1) (1883) 8 App. Cas. 658, at p. 673.
(2) 8 App. Cas. at p. 670.
(3) [1891] 1 Q. B. 485.
(4) (1865) 6 B. & S. 257.

C. A. 1906

GOLDSMITHS' COMPANY v. WYATT.

Channell J. His judgment must be discharged, and the two questions in the case should be answered in the affirmative.

Appeal allowed.

Solicitors for plaintiffs: *Prideaux & Sons.*
Solicitors for defendant: *James & James.*

E. L.

1906 *Nov.* 15.

THE KING *v.* COMMISSIONERS OF INLAND REVENUE. *Ex parte* SILVESTER.

Pawnbroker—Licence—Certificate—"Successor"—Exemption from necessity of obtaining Certificate—Pawnbrokers Act, 1872 (35 & 36 *Vict.* c. 93), *s.* 39.

By s. 39 of the Pawnbrokers Act, 1872, a pawnbroker's licence is only to be granted to an applicant upon the production of a certificate granted under the Act, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors to obtain such certificate":—

Held, that the exemption in favour of a successor only enabled him to carry on without obtaining a certificate the actual business in which he had succeeded a pawnbroker licensed at the commencement of the Act of 1872, and did not enable him to open or carry on a new business merely upon the payment of the licence duty and without obtaining a certificate.

Reg. v. *Commissioners of Inland Revenue* (*Ohlson's Case*), [1891] 1 Q. B. 485, discussed.

ORDER nisi to the Commissioners of Inland Revenue to shew cause why a writ of mandamus should not issue commanding them to grant to Thomas Silvester, pursuant to the provisions of 35 & 36 Vict. c. 93, a licence for carrying on the business of a pawnbroker at premises known as 47, High Street, Moxley, in the county of Stafford, upon payment by Silvester of the duty payable by him in respect of the said licence, and without requiring the production by him of a certificate by justices (1) in that behalf.

(1) By s. 40 certificates under the Act are to be granted by metropolitan police magistrates, stipendiary magistrates, or justices in their several jurisdictions. By s. 27 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), the power of justices to grant pawnbrokers' certificates, when

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER *Ex parte.*

By s. 37 of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), every pawnbroker is to take out from the Commissioners of Inland Revenue an excise licence for carrying on his business, and a separate licence is to be taken out and paid for by a pawnbroker for each pawnbroker's shop kept by him. By s. 39 a pawnbroker's licence is not to be granted to any person except on the production and in pursuance of the authority of a certificate granted under the Act, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors to obtain such a certificate." The certificate is, by s. 43, only to be refused upon the ground that the applicant has failed to produce satisfactory evidence of good character, that the shop in which he intends to carry on his business, or any adjacent house or place owned or occupied by him, is frequented by thieves or persons of bad character, or that he has not complied with the provisions of s. 42 as to the giving of notices on a first application for a certificate. The Act came into operation on January 1, 1873.

The facts, as they appeared upon the affidavits filed, were shortly as follows: The father of Silvester carried on business as a licensed pawnbroker at 27, Spon Lane, West Bromwich, from 1844 until his death in 1864. His widow (Silvester's mother) carried on the business with a licence in her own name until 1882, when Silvester purchased the business from his mother and the business and premises were transferred and assigned to him; from that date he carried on the business in his own name. The licence was, however, annually taken out in the mother's name until her death in 1890, from which date until the present time Silvester had annually taken out the licence in his own name without being required to obtain or produce a certificate under s. 39 of the Pawnbrokers Act, 1872.

In May, 1902, Silvester, while still carrying on the business at West Bromwich, purchased from one Thomas Watson premises

---

arising within a county district, is transferred to the district council of the district. The reference in the order nisi to a certificate "by justices" was inaccurate; it should have been a certificate of the district council.

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER, *Ex parte.*

at 47, High Street, Moxley (about five miles distant), with the stock and goodwill of the pawnbroker's business carried on by Watson at that address. Watson was not a licensed pawnbroker at the commencement of the Pawnbrokers Act, 1872, nor was he the executor, administrator, assign, or successor of a person who was a licensed pawnbroker at that date. From May, 1902, to the present time Silvester had carried on the business of a pawnbroker at Moxley as well as at West Bromwich. The benefit of Watson's licence, which expired on July 31, 1902, was transferred by the Inland Revenue authorities to Silvester under the provisions of 6 Geo. 4, c. 81, s. 21, and after its expiry a pawnbroker's licence was granted to Silvester in his own name in respect of the Moxley premises for the three years commencing July 31, 1902, 1903, and 1904 respectively without his being required to obtain or produce a certificate under s. 39. In October, 1904, Silvester was informed by the supervisor of Inland Revenue that his licence would not be renewed in 1905 without the production of a certificate. In July, 1905, Silvester's solicitor applied in writing on his behalf to the local collector of Inland Revenue for a renewal of his licence in respect of the Moxley business from July 31, 1905, to July 31, 1906, and enclosed a money order for the amount of the duty payable in respect of the licence. The money order was returned by the collector, who refused to issue a licence without the production to him of a certificate under s. 39. Silvester declined to obtain a certificate, and after some correspondence with the Commissioners of Inland Revenue the present order nisi was obtained.

Sir J. Lawson Walton, *A.-G.*, and *W. Finlay*, for the Commissioners, shewed cause. Silvester is not within the class of persons protected by s. 39 of the Pawnbrokers Act, 1872. The acquisition by him of the West Bromwich business, which had been in existence in 1872, and as to which he was entitled to a licence without obtaining a certificate, did not give him the right of creating or acquiring a new business without obtaining one. The privilege of opening a new business merely on payment of licence duty is a personal privilege conferred on pawnbrokers licensed in 1872 and is not assignable. The terms "assign"

and "successor," as used in s. 39, mean an assign or successor in the actual business carried on by the privileged pawnbroker; the successor of a privileged pawnbroker has no personal privilege, but only a strictly limited right. The successor gets the advantage of being enabled to purchase an exempted business, but not the privilege of creating one. If Silvester's contention is right, he can, though only a successor, confer on *his* successor in any part of the country this personal privilege, with the result that the provision of s. 39 as to the requirement of a certificate would become practically a dead letter. The decision in *Reg.* v. *Inland Revenue Commissioners* (*Ohlson's Case*) (1) was no doubt right on the particular facts, but its principle should not be extended. The intention of the Legislature was to allow the class of privileged pawnbroker to die out gradually without inflicting any hardship upon vested interests. [They also cited Turner on the Pawnbrokers Act, 1872, 3rd ed. p. 141.]

[The *Attorney-General* reserved his right to contend on any future occasion that a mandamus would not lie to the Commissioners as servants of the Crown, but for the purposes of the present case he waived that objection in order to obtain a judicial decision upon the question at issue, following the precedent for that course in *Reg.* v. *Inland Revenue Commissioners* (2) and in *Reg.* v. *Inland Revenue Commissioners.* (1)]

Avory, K.C., and *C. L. Attenborough*, in support of the rule. No doubt there is considerable force prima facie in the contention of the Commissioners, but the case is governed by the principle of the decision in *Ohlson's Case.* (1) When it is once admitted that a pawnbroker who was licensed in 1872 is entitled to open a new business without obtaining a certificate, it follows logically that his successor is entitled to do the same. The effect of s. 39 is that the successor is in the same position as the licensed pawnbroker himself, and it follows that if Silvester's mother was entitled to open a new shop without a certificate, as she undoubtedly was, Silvester is himself entitled to the same privilege. It is not necessary to contend that a successor includes a successor of a successor; the meaning of the word may be limited, and would naturally be limited, to an immediate

(1) [1891] 1 Q. B. 485. (2) (1888) 21 Q. B. D. 569.

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER, *Ex parte.*

successor. It is plain that the arguments for the Commissioners in the present case were present to the minds of the Court in *Ohlson's Case* (1), for in answer to a question by Charles J. whether the privilege preserved to the licensed pawnbroker was not that of carrying on business in any shop for which he got a licence, Sir Edward Clarke contended that his privilege must be limited to the business which he was carrying on at the commencement of the Act, and pointed out that otherwise his successors in infinitum might open new businesses without obtaining a certificate, and the provisions as to the requirement of a certificate would be rendered wholly nugatory. The privilege is a general privilege to the particular class of pawnbrokers and their successors, and is not restricted to a particular shop or business. It is clear that this was the view of Charles J., who in his judgment decided in terms the point raised in the present case.

LORD ALVERSTONE C.J. This case undoubtedly raises a question of some difficulty, but I am of opinion that our judgment should be for the Crown. It is not denied that the present is an attempt—a perfectly fair one, be it understood—to extend the effect of the decision in *Ohlson's Case*. (1) In that case Ohlson, a pawnbroker, had claimed to have a licence in respect of a business which he had bought from a pawnbroker licensed in December, 1872, without being required to produce a magistrate's certificate, and a passage in the judgment of Charles J. has been much relied upon in the arguments on behalf of the pawnbroker to-day; it runs thus: "In the present case Ohlson is the assign of Pockett and the successor of Creshull; Pockett and Creshull were both licensed pawnbrokers at the time of the passing of this statute, and in my judgment they were both entitled to the privilege of opening new premises with a new licence without the certificate prescribed by s. 39—a privilege which is to be enjoyed by their successors and assigns, and which is therefore enjoyed by Ohlson in the present case." I do not think that Charles J. had in his mind the question whether those successors would be entitled to go on opening fresh businesses on the same terms; that learned judge was dealing merely

(1) [1891] 1 Q. B. 485.

with the actual point before him, the right of Ohlson to continue the particular business as an assign or successor, without obtaining a magistrate's certificate before he got his licence; and if his language is to be construed as meaning more than that, it was unnecessary to the decision of the point raised in the case. That point was that Ohlson had acquired a business that had been opened by a pawnbroker licensed in 1872, and could continue the business on those premises under a licence without first obtaining a magistrate's certificate. That is made clear by the reference in the judgment to the decision of Sir Thomas Henry, who had said in a case of *Reg.* v. *Bate*, which is discussed in Turner on the Pawnbrokers Act, 1872, 3rd ed. p. 141, that "every pawnbroker in business before the Act was passed was entitled to open as many shops as he pleased on payment of the excise duty for each." And in *Ohlson's Case* (1) Stephen J. said: "If the contention of the Solicitor-General is right we must, in order to give effect to it, read into the section words restricting the right of a pawnbroker licensed at the commencement of the Act to obtain a licence without production of a certificate to the mere obtaining of a licence in respect of the business which at that time he was carrying on. What weighs very greatly with me in coming to the present conclusion is the practice of the Inland Revenue Commissioners for the past sixteen years. So long ago as the year 1874 this very point was decided by Sir Thomas Henry, for whose decisions we all have great respect, and the least that can be said with regard to the case before him is that it pointedly called the attention of the Commissioners to the question, the learned magistrate having offered to state a case—an offer refused by the Commissioners, who, by their refusal, must be taken to have acquiesced in the decision. That is a very strong contemporaneous exposition of the meaning of the Act.' It is clear, therefore, that both Stephen J. and Charles J.—most certainly the former—never thought of anything more than recognizing that which Sir Thomas Henry had recognized, namely, the right of a pawnbroker licensed in 1872 to open under his personal privilege any number of houses, and to convey to his successors in those houses the right to have their

(1) [1891] 1 Q. B. 485.

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER, *Ex parte.*

Lord Alverstone C.J.

licences for those houses without a certificate. The language of Charles J., if read without paying attention to the point before the Court, might perhaps appear to go further, but I am quite satisfied that he did not intend to deal with the point raised in the present case, that is, the right (if any) of a successor to open fresh places of business; speaking for myself, I should not be prepared to apply the principle of the judgment in *Ohlson's Case* (1) beyond the actual point there decided, unless I were satisfied that the statute clearly had the meaning contended for.

We have to consider whether s. 39 gives the same privilege to a successor of opening any number of other shops; the language of the section is, "it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors to obtain such a certificate." The word "successor" in this connection is not a term of art; it means somebody whom the Act contemplates as being the successor to the man who was to be protected by the Act of 1872, and I think that the Legislature meant to refer to the successor in the pawnbroker's business, and did not intend to clothe that successor with the personal rights which in *Ohlson's Case* (1) were held to belong to a pawnbroker licensed in 1872. Therefore assuming, as I do assume, that that decision is right and is binding upon us until overruled, and that that personal privilege attaches to the pawnbroker himself, I am not prepared to extend it. The Act itself contains no definition of "successor," nor does its language help us in placing a construction or meaning on the word; in my judgment it does not mean that a person by reason of the fact that he has merely bought the business of a pawnbroker acquires a right to open any others, but it means that the successor to a pawnbroker in the business that he is carrying on shall have the same privilege in relation to the same business that the pawnbroker himself had. I think, therefore, that a new place of business cannot be opened by a successor without the certificate of the district council, and that this rule must be discharged.

(1) [1891] 1 Q. B. 485.

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER, *Ex parte.*

DARLING J. I am of the same opinion. During the argument much has been said about the passage in the judgment of Charles J. in *Ohlson's Case* (1), which my Lord has already read. I think that what the learned judge meant to indicate was a privilege that was to be enjoyed in the sense that the successors of Pockett and Creshull were, without getting a justices' certificate, to enjoy the carrying on of a pawnbroker's business in those premises which Pockett and Creshull had already opened. I do not think he meant a privilege which was to be enjoyed by their successors in the sense contended for to-day, that when once you get a successor of such a pawnbroker as Pockett or Creshull was, that successor may go on opening any number of new businesses without getting the certificate. If he did use the word "privilege" in the latter sense, I think it obvious that he was deciding more than was necessary to the decision of the case before him, and that his view was merely an obiter dictum and consequently not binding upon this Court. If we were to give effect to-day to the contention on behalf of the pawnbroker, the inconvenience would unquestionably arise which was referred to by Sir Edward Clarke in his argument in *Ohlson's Case* (1), in these words: "A contrary interpretation would destroy the value of the Act, for any successor or assign of a pawnbroker licensed in December, 1872, might open as many new businesses as he pleased and transfer them to assignees, who in their turn could do the same, and so on ad infinitum, which would render wholly nugatory the requirement of a magistrate's certificate." It seems to me that would be the necessary consequence of making this rule absolute, and that the statute never intended such a consequence; for it would be very difficult to say that a successor of a successor is not the successor of the original pawnbroker. We speak commonly of the present King as the successor of Edward I., but there have been in fact many intervening successors between the two monarchs, and it might conceivably be contended that he is only the successor of the last occupant of the throne. That is the kind of argument which would very possibly be used if, fifty years hence, it were to be contended that anyone who called himself

(1) [1891] 1 Q. B. 485.

1906

REX v. INLAND REVENUE COMMISSIONERS. SILVESTER *Ex parte.*

Darling J.

the successor of a person who was himself the successor of a pawnbroker licensed in 1872 might go on opening fresh businesses without the necessity of getting a certificate. No doubt the Act used the word "successor" in a wide sense, but it did not intend to allow the successor of a pawnbroker to do that which *Ohlson's Case* (1) decided that the pawnbroker himself could do and that his immediate successor could take advantage of. That decision does not oblige us to come to the conclusion that has been pressed upon us to-day, and I agree that this order nisi cannot be made absolute.

Order nisi discharged.

Solicitors for prosecutor: *Attenborough & Son.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

W. J. B.

1906
Nov. 27, 28.

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY *v.* MARITIME INSURANCE COMPANY AND CROSHAW.

Ship—Mortgage of Ship together with Policies of Insurance thereon—Particular average Loss—Repairs by Mortgagor—Right of Mortgagee to Policy Money without paying for Repairs—Marine Insurance—Salvage Loss—Right of Underwriters to pay without Authority of Assured—Assignment of Claim under Policy—Validity of.

The owner of a ship mortgaged her "together with the policies of insurance effected thereon" to secure advances. The ship, while insured, suffered a particular average loss within the policy, and the owner had her repaired. The owner being in default under the mortgage, the mortgage debt by the terms of the deed became immediately payable:—

Held, that the policy of insurance was to be treated as a substantive and independent security for the mortgage debt, and that the mortgagee was entitled to recover from the underwriters for his own use the amount of the particular average loss without being under any obligation to apply the money in payment of the cost of the repairs.

Where a ship is insured under a time policy and a particular average loss occurs, an assignment of the assured's claim against the underwriters in respect of that loss may be valid, notwithstanding that it is not expressed to assign the policy itself, if at the date of the assignment

(1) [1891] 1 Q. B. 485.

the policy has expired so that nothing remains to be done under it but to pay the claim.

A ship having, while insured, incurred salvage expenses as the result of a peril insured against, H., at the request of the owner, paid the salvors. The owner afterwards assigned to a creditor all moneys payable to him under the policy of insurance on the ship, and gave notice of the assignment to the underwriters. Subsequently H. applied to and received from the underwriters the amount payable under the policy in respect of the salvage loss. There was no clause in the policy authorizing the underwriters themselves to apply the policy money in satisfaction of the salvage claim, nor had the owner otherwise authorized them so to do:—

Held—(1.) that in the absence of such authority the payment by the underwriters to H. was not a discharge of their obligation under the policy; and (2.) that, as before that payment the rights of the assignee had intervened, they had paid the wrong persons, and that they must consequently pay the money over again.

TRIAL of action before Channell J. without a jury.

By a statutory mortgage dated July 3, 1901, E. Hawthorne, the then owner of the steamship *Scotian*, mortgaged "the ship . . . . together with the policies of insurance effected and to be effected thereon" to George Croshaw and his assigns, the mortgage being expressed to be "for the purpose of better securing . . . . the payment" of a sum of 1500*l.* then advanced, and further sums to be advanced on current account, with interest. The mortgagor thereby covenanted to repay the principal sum by instalments, and to keep the ship repaired and fully insured; and the deed further provided that, in the event of the mortgagor failing to repay any instalment of the principal money or the interest at the stipulated dates, the whole sum should immediately become due and payable. In July, 1902, the property in the *Scotian* became vested in G. H. Elder subject to the mortgage to Croshaw. In December, 1903, Elder, in pursuance of the covenant in the said mortgage in that behalf, insured the *Scotian* against all risks in the sum of 16,000*l.*, and the policy was subscribed by the defendants, the Maritime Insurance Company, to the extent of 2000*l.* The policy was a time policy for twelve months from December 30, 1903. That policy was in December, 1904, handed by Elder to Croshaw. In November, 1904, Elder was in default under the mortgage in respect of non-payment of interest due. On November 22, 1904, during the currency of the said policy, the

1906

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY v. MARITIME INSURANCE COMPANY AND CROSHAW.

Scotian stranded whilst on a voyage from Antwerp to the Tyne. She was in distress, and was towed by salvors to Rotterdam, where temporary repairs were effected. The salvors claimed bail in a sum of 2000*l.* as a condition of allowing the ship to leave Rotterdam. Thereupon a firm of Messrs. Holman & Sons, at the request of Elder, gave the necessary bail. The ship was brought home, and Elder had her repaired in December, 1904, by the plaintiffs, Cleland's Graving Dock and Slipway Company, at a cost of 756*l.* 17*s.* 4*d.* On February 24, 1905, Elder, being pressed by Cleland's for payment, assigned to them as security for certain specified debts, including the said sum of 756*l.* 17*s.* 4*d.*, "all moneys payable" to Elder or the mortgagee of the said ship "under all policies of insurance" of the said ship, subject to the claims, if any, of the mortgagee thereto, and notice of the assignment was given to the Maritime Insurance Company, and to Croshaw, the mortgagee. In March, 1905, Elder was adjudicated a bankrupt, and the plaintiff W. Swan was appointed trustee in the bankruptcy. In July, 1905, Messrs. Holman & Sons, who in the meantime had paid to the salvors the amount of the salvage award, applied to and recovered from the Maritime Insurance Company the sum of 94*l.* 3*s.* 11*d.*, being their proportion of the total sum payable under the policy in respect of the salvage loss, which amounted to 753*l.* 11*s.* 2*d.*, and in consideration therefor they gave the insurance company an indemnity against the consequences of the payment. In June, 1906, Swan, as trustee in bankruptcy of Elder, and Cleland's, as the assignees of the moneys payable under the said policy, sued the Maritime Company to recover the sums payable by them thereunder, namely, 121*l.* 4*s.* 3*d.*, being their proportion of the sum of 969*l.* 14*s.* 4*d.* payable in respect of particular and general average losses, and the above-mentioned sum of 94*l.* 3*s.* 11*d.* in respect of the salvage loss; and, as Croshaw claimed to be entitled, under the mortgage, to the amount due under the policy in respect of the particular and general average losses, they joined Croshaw as defendant. At that time there was due to Croshaw a sum in excess of the said 969*l.* 14*s.* 4*d.*, but he made no claim to any part of the 753*l.* 11*s.* 2*d.*, payable in respect of the salvage loss.

1906

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY v. MARITIME INSURANCE COMPANY AND CROSHAW.

By a letter written by his solicitors before action brought, he expressly abandoned his claim to any part of the latter sum. The Maritime Insurance Company did not dispute their liability to pay their proportion of the particular and general average losses, but, being in doubt whether the plaintiffs or the mortgagee were the parties entitled thereto, they paid into Court under an interpleader order the said sum of 121*l.* 4*s.* 3*d.* They, however, disputed their liability to pay their proportion of the salvage loss upon the ground, amongst others, that they had already discharged, in that respect, their indemnity of Elder, the assured, by paying Messrs. Holman & Sons.

J. A. Hamilton, K.C., and *Chaytor*, for the plaintiffs. The mortgagee is not entitled to retain for his own use the whole amount of the policy money payable in respect of the particular and general average losses and leave the mortgagor and his assigns to pay for the cost of the repairs of the vessel. Under the mortgage, whereby the owner mortgaged the ship together with the policies of insurance to be effected thereon, the security which the mortgagee got was that of a repaired ship. The policies were not intended to be an independent and substantive security, but to insure the maintenance of the security of the ship as a sound and repaired ship. The mortgagor by the mortgage covenanted to repair the ship, and the policies were intended to insure that he should have the means of performing that covenant. Here the ship has been in fact repaired, and the mortgagee is not entitled to have the benefit of the repairs and take the policy money too. He ought to be required to apply the money in payment of the debt for repairs.

With regard to the salvage loss, the insurance company are still liable under the policy. For Messrs. Holman & Sons, whom they paid, were not in the position of assured. They were merely creditors of Elder, at whose request they had settled with the salvors; and before they had received payment from the insurance company, their debtor Elder had both assigned his rights under the policy to Cleland's and had also become bankrupt. Therefore, instead of receiving payment of Elder's debt to them in full, they were entitled only to prove against his estate.

1906

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY v. MARITIME INSURANCE COMPANY AND CROSHAW.

Whether the assignment to Cleland's is good as against the trustee in bankruptcy is a question that does not arise here, for they are joined as plaintiffs in the action.

Scrutton, K.C., *Mackinnon*, and *Croshaw*, for the mortgagee. The mortgage deed provided two separate and independent securities, the ship and the policies. Had the question as to the mortgagee's right to the policy money arisen before the ship had been repaired, there could have been no doubt that he would have been entitled to put the money in his pocket or apply it in repairing the ship at his election. And the fact of the mortgagor having done the repairs cannot affect the mortgagee's right to retain the money. Cleland's knew that the ship was mortgaged, and therefore before repairing her they ought to have gone to the mortgagee and got his permission for the application of the policy money to the cost of the repairs. Instead of doing that they trusted to Elder, who was insolvent.

Bailhache, for the Maritime Insurance Company. There are three objections to the recovery by the plaintiffs of the money alleged to be payable by the insurance company in respect of the salvage loss. In the first place, the plaintiffs are not in possession of the policy; it is in the possession of Croshaw, the mortgagee, and the plaintiffs cannot sue without producing the policy. Underwriters are only liable to pay upon a policy upon its production to them, and the defendants have done nothing in the present case to waive their right to that production. Secondly, the action is an action by the Graving Dock Company as assignees, the trustee in bankruptcy being joined merely as a formal plaintiff, and a claim under a policy of marine insurance is not in law assignable without an assignment of the policy itself, which in this case was not made. A claim under a policy is a claim for unliquidated damages: *Pellas* v. *Neptune Marine Insurance Co.* (1); and not the less so because the claim has been adjusted and the amount stated by the average adjuster. A right to recover unliquidated damages for breach of a contract cannot be assigned: *May* v. *Lane*. (2) The objection to such an assignment is that it would offend against the law of champerty and maintenance. Thirdly, if the defendants are wrong upon the last point,

(1) (1879) 5 C. P. D. 34. (2) (1894) 64 L. J. (Q.B.) 236.

still they are no longer liable to anyone, having already discharged their only obligation under the policy. The only right which Elder had to assign was a right to be indemnified against his liability to Holman & Sons, who had satisfied the salvors' claim at his request. But the insurance company have indemnified him, for they have paid Messrs. Holman, and thereby extinguished the liability.

J. A. Hamilton, K.C., in reply. The rule that a claim under a contract for unliquidated damages cannot be assigned without an assignment of the contract itself has no application to a case in which, the claim being under a policy of marine insurance, the policy has expired at the date of the assignment, for in such case the claim is all that remains to be assigned.

CHANNELL J. This case raises some rather intricate points which are due entirely to the fact of the insolvency of Elder, the owner and mortgagor of the ship. But for that insolvency everybody would have been paid in full, and the points in question would not have arisen for consideration.

I will deal first with the question of the right to the 121*l.* 4*s.* 3*d.*, the defendant company's proportion of the 969*l.* 14*s.* 4*d.* payable under the policy in respect of the particular and general average losses. That question arises only as between the plaintiffs, the trustee in Elder's bankruptcy and the assignees of the moneys payable under the policy, on the one hand, and Croshaw the mortgagee on the other. The insurance company did not dispute their liability, but, being in doubt as to which of the parties was entitled to the money, paid the money into Court under what was practically an interpleader order to abide the issue. No question arises as to which of the parties would be the proper party to sue the underwriters, and I have to decide the matter as if the sum had been paid to the broker who effected the insurance. The question is between mortgagor and mortgagee, and it is obvious that the rights between them must be determined by reference to the terms of the mortgage deed. Suppose in this case that the money had been recovered from the underwriters before the ship had been repaired, I think it is absolutely clear that under this deed the money would belong to the

1906

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY v. MARITIME INSURANCE COMPANY AND CROSHAW.

Channell J.

mortgagee, and if the mortgagor desired, as in substance he is claiming in this case, that the money should be applied in payment of the cost of doing the repairs he would either have to get the consent of the mortgagee to its being so applied or he would have to shew that that consent had been given in the mortgage deed itself. But I cannot find anything in the present deed which provides for the policy money when recovered being so applied. It is a very common thing in contracts with reference to fire insurance, as between mortgagor and mortgagee or lessor and lessee, to insert a clause to the effect that the policy money shall be applied in restoring the property, and it might have been a very reasonable thing to have inserted such a clause here, but it has not been done. Mr. Hamilton's contention depends upon the proposition that the mortgagee has this policy as a security, not for his debt, but for his security—that is to say, that he has the policy to cover damage to the ship because the ship is his security, and that security requires to be kept intact. But if you look at the terms of the contract it gives the mortgagee the policy as a security for his debt, and not merely as a security for his security; "for the purpose of better securing . . . . the payment of such sums as aforesaid" it mortgages "the ship . . . . together with the policies of insurance effected and to be effected thereon." And the fact that the repairs here were executed before the money was paid by the insurance company in my opinion makes no difference. I accordingly hold that the mortgagee is entitled to the sum paid into Court.

I now turn to the other matter in dispute, as to the 94*l.* 3*s.* 11*d.*, which is claimed by the plaintiffs from the insurance company in respect of the salvage loss. The first objection taken by Mr. Bailhache on behalf of the insurance company is a technical one. It is of course perfectly justifiable to take such a point, though perhaps if the underwriters were defending on their own account it is not a point which one would expect them to raise. But here they are in fact defending in the interests of other persons whom they have paid and from whom they have received an indemnity for the payment. The point is that the plaintiffs are not the holders of the policy of insurance, and that,

not having possession of it, they cannot sue upon it. I do not think that that contention is well founded. The policy may be lost, but the action can be maintained just the same if the plaintiff can prove it. The production of the policy at the trial, if it is in dispute, is necessary, but it can be produced by subpœnaing the person who has it, and the non-production is merely a ground for suspecting that somebody else has an interest in it. And it would be a complete answer to the underwriters' objection to pay on the ground of non-production that they were not under a liability to anyone else. Here the mortgagee, the person in whose possession the policy is, by the letter which his solicitors wrote before action conclusively abandoned any claim to have more under the policy than the 969*l.* 14*s.* 4*d.* He makes no claim to the money payable for the salvage loss. Therefore the fact that the policy is in the hands of the mortgagee can afford no answer to the plaintiffs' claim. The next objection is that the action is really brought by the graving dock company as assignees of the money due under the policy, and that the trustee is merely lending his name for the purpose of carrying out that assignment. And it is said that the plaintiffs, suing in that capacity, cannot recover unless the assignment is good in law. The suggestion is that the assignment is not good because it is an assignment of unliquidated damages, and the case of *May* v. *Lane* (1) was cited as an authority for the proposition that an assignment of unliquidated damages is invalid. Even if that proposition does not go too far, I think it clearly does not apply to the case of an assignment of a policy of insurance. The case of *Lloyd* v. *Fleming* (2) is a distinct authority that a policy may be assigned after loss. Blackburn J. there said: "After a loss the policy of insurance and the right of action under it might, like any other chose in action, be transferred in equity, though at common law the action must have been brought in the name of the original contractor, the assignor. Such an assignment may be objectionable on the ground of maintenance or champerty, but it is not necessarily so, and no circumstances are stated on this record to raise such a defence." That case is an authority that a right to recover

(1) 64 L. J. (Q.B.) 236. (2) (1872) L. R. 7 Q. B. 299.

1906

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY v. MARITIME INSURANCE COMPANY AND CROSHAW.

Channell J

unliquidated damages under a policy of insurance is assignable, provided that, so far as is practicable, the policy itself is assigned with it. And here the policy was assigned, so far as was practicable, to the graving dock company. The assignment to them was in substance a second mortgage, the policy being already assigned to, and in the possession of, Croshaw, the first mortgagee. The assignment to the graving dock company was a conveyance to them of Elder's equity of redemption in the policy. And there was nothing to shew that it was open to any objection on the ground of champerty or maintenance. It was a perfectly bona fide transaction to secure an existing debt. No substantial distinction can be drawn between an assignment of a claim for damages under a policy and an assignment of the policy itself in a case in which, as here, the policy is exhausted at the date of the assignment, so that nothing remains to be done under it but to satisfy the claim. Therefore that point also fails the underwriters. The last defence set up by the insurance company is one going to the merits—it is that they have paid the person who had paid the salvors, and that, as a policy of marine insurance is only an indemnity, they have indemnified the assured, who has consequently suffered no loss. I do not think that that defence is sound. The answer to it is twofold. In the first place, it assumes that the underwriters have the power to take out of the hands of the assured the management of all matters arising out of the loss. But that power can only exist where there is an express agreement to that effect between the parties, as is commonly the case in fire policies. But there is nothing of that kind here. In the absence of such agreement the shipowner is entitled to settle the loss himself and determine for himself what is best to be done in the matter of the repairs. It is not for the underwriters to pay the loss without the assured's consent, and then say that they have indemnified him according to the contract. It is not suggested here that the payment of Messrs. Holman by the defendants was made with the authority of the assured. No doubt if it had not been for Elder's insolvency everybody having claims upon him would in fact have been paid, and this question would not have arisen. But in point of law, whether he was insolvent or not,

the absence of his authority to the underwriters to pay Messrs. Holman would have been a sufficient answer to this defence. Secondly, there is a further and independent answer to it. The rights of third parties had intervened before the payment by the defendants was made. Elder had in the meantime been adjudicated a bankrupt. And he had also previously assigned to the graving dock company all the moneys payable under the policy, of which assignment the defendants had had notice. Under those circumstances they could not possibly justify paying Messrs. Holman. For to their knowledge the money belonged either to the assignees or to the trustee in bankruptcy. Messrs. Holman had unfortunately advanced money to Elder without getting a security, and as he had become bankrupt all that they were entitled to do was to prove against his estate for a dividend. Therefore even if express authority had been given to the underwriters by the assured, in the policy or otherwise, to pay the salvage loss, the moment the rights of the assignees or of the trustee intervened that authority was at an end, and therefore on this ground also the defence fails. There will be judgment for the mortgagee Croshaw as against the plaintiffs for the sum of 121*l.* 4*s.* 3*d.* which was paid into Court, and for the plaintiff as against the defendant company for the sum of 94*l.* 3*s.* 11*d.*

Judgment accordingly.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for Croshaw: *Parker, Garrett, Holman & Howden.*

Solicitors for the Maritime Insurance Company: *Holman & Birdwood.*

J. F. C.

1906
Nov. 7.

DOUGLAS *v.* SMITH.

Parliament—Franchise—Dwelling-house—"Inhabitant Occupier" or "Lodger"—Resident Landlord—Prima facie Proof—Rebutting Evidence—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2; *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5; *s.* 28, *sub-ss.* 10, 11.

At a court held by a revising barrister the appellant claimed to be entitled to the franchise as an "inhabitant occupier" under s. 3, sub-s. 2, of the Representation of the People Act, 1867, and s. 5 of the Parliamentary and Municipal Registration Act, 1878.

The revising barrister found—

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(3.) That such landlord was rated for the entire house as a separate tenement:—

Held, that these facts constituted evidence upon which the revising barrister could decide that there was prima facie proof of a ground of objection that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of the Acts.

The appellant had also made a claim to be entitled to the franchise in respect of the lodger qualification. The revising barrister considered that that fact strengthened to some extent the prima facie proof of the ground of objection. In order to rebut the prima facie proof of the ground of objection the appellant produced a document signed by himself and his landlord containing (inter alia) a statement to the effect that the landlord had no control whatever over the appellant's rooms; but the revising barrister did not accept the statements in the document as facts, and held that the document was not sufficient to rebut the prima facie proof of the ground of objection that the appellant was not an inhabitant occupier:—

Held, that the revising barrister was justified in coming to that conclusion.

Case stated by the revising barrister for the parliamentary borough of Hackney.

At a court held before the revising barrister, Henry Douglas the appellant, by his agent, Burton J. Dann, contended that, notwithstanding a notice of objection dated August 20, 1906, delivered by Jonah Smith the respondent, to the town clerk of Hackney, acting as overseer of the poor for the borough, the

name of the appellant ought to be retained on the list of persons entitled to be registered as parliamentary electors for the parliamentary borough of Hackney, North Division, and as county electors for the administrative county of London, and as parochial electors for the metropolitan borough of Hackney.

The notice of objection stated that the respondent objected to the appellant's name being retained on division 1 of the occupiers' list of electors for the parish of St. John at Hackney as a parliamentary elector for the parliamentary borough of Hackney, North Division, and as a county elector for the administrative county of London, and as a parochial elector for the above metropolitan borough, on the grounds (inter alia) 1. That the appellant had not occupied the qualifying premises as owner or tenant for twelve months immediately preceding July 15, 1906. 4. That for twelve months immediately preceding July 15, 1906, the appellant had not been the inhabitant occupier of a dwelling-house in the premises specified in the list issued by the town clerk. 5. That within the said period the appellant was a lodger in apartments in a dwelling-house; that such apartments were not occupied by him free of any control of the landlord, and were not separately rated or rateable as for an occupier.

The name of the appellant had been placed on the list by the town clerk on information obtained by him in answer to inquiries which he had made in consequence of what he understood to be the effect of the decision of the Court of Appeal in *Kent* v. *Fittall* (1), and had been so placed as the name of a person entitled to be on the list as a tenant occupier of a dwelling-house, being part of a house, such part being separately occupied (by that person) as a dwelling within the meaning of the Representation of the People Act, 1867, s. 3, and the Parliamentary and Municipal Registration Act, 1878, s. 5.

The revising barrister found as facts—

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(1) [1906] 1 K. B. 60

1906

DOUGLAS v. SMITH.

(3.) That such landlord was rated for the entire house as a separate tenement.

In support of the objection it was submitted that these facts were prima facie proof of the ground of objection within the meaning of s. 28, sub-ss. 10 and 11, of the Parliamentary and Municipal Registration Act, 1878.

The revising barrister held that the facts were prima facie proof of the ground of objection (that is to say, that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of the Acts, but that he had merely occupied the premises as a lodger).

On behalf of the appellant the following paper marked "B," which had been sent to the appellant and signed by him as well as by William Butler, the resident landlord, was produced, and it was contended that this was sufficient to rebut the prima facie proof afforded by the facts above mentioned.

"B.

"Dear Sir,—The Conservative agent objects to your vote. I should be glad if you would kindly answer the following questions so that I can defend your case. Kindly return as early as possible, and oblige.

"Yours faithfully,

"Burton J. Dann.

"*General Remarks.*

"How long here?—Since November, 1899.

"How many rooms furnished or unfurnished?—Five rooms unfurnished.

"Has the landlord any right of entry to your rooms?—No.

"Have you keys and can you lock up the rooms?—Yes.

"Have you a key to the street door and can you come in when you like?—Yes.

"Has the landlord any control whatever over your rooms?—No.

"Dated 31st August, 1906.

"(Signed) Henry Douglas.

"P.S.—If possible, please get the landlord to sign also.

"Wm. Butler."

No further evidence was tendered. The revising barrister decided that the document "B" was not sufficient to rebut the prima facie proof afforded by the facts above mentioned which he had found. Accordingly he allowed the objection, and expunged the name of the appellant from the list.

The revising barrister made a note in the margin of the case, the material part of which was as follows:—

"In the case of the appellant . . . . a claim had been made for a lodger's vote. This (in my opinion) strengthened to some extent the prima facie proof afforded by my findings in fact (1.), (2.) and (3.) aforesaid; but I held that those findings in fact were sufficient prima facie evidence."

The revising barrister was of opinion that, if the Court held that his decision was wrong on either of the points above stated, the register ought to be amended by inserting the name of the appellant.

During the arguments in the High Court upon the case stated by the revising barrister (who was present) the Court requested him to state whether he found the facts stated in the document "B" proved. The revising barrister, in reply to the Court, stated orally that he did not intend to find that the facts so stated were proved.

Danckwerts, K.C., and *J. A. Johnston*, for the appellant. The mere fact that the landlord resides on the premises is no indication whatever that the appellant is a lodger. The question is, Does the landlord retain control of the house as a whole as master?—*Kent* v. *Fittall*. (1) Although in the first instance that is a question of fact, after the facts have been found the question becomes one of law. The legal proposition which the facts must satisfy is that it must, in order to deprive a man of his vote as an inhabitant occupier, be shewn that the landlord has retained the control of the house as a whole as master. The fact that the landlord resides in the house in no way finally indicates that the tenant is not an inhabitant occupier. The vital question is whether the landlord has control of the premises. It is quite clear from the judgments in *Kent* v. *Fittall* (1) that the fact that the landlord resides on the premises is not

(1) [1906] 1 K. B. 60.

1906

DOUGLAS v. SMITH.

conclusive one way or the other. The real question is, Does the landlord continue to be master of the house?

[The Representation of the People Act, 1867, ss. 3 and 4, and the Parliamentary and Municipal Registration Act, 1878, s. 5, were also referred to.]

Lewis Coward, K.C., and *W. H. Clay*, for the respondent. The fact that the landlord resides on the premises is some evidence that the tenant is a lodger, and the document produced to the revising barrister was not sufficient to rebut the presumption arising from that evidence. The respondent gave the prima facie proof of the ground of his objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, and in the absence of any sufficient evidence to rebut the prima facie proof that the appellant was not an inhabitant occupier, but was a lodger, the revising barrister was right in upholding the objection: *M'Daid* v. *Chambers* (*Keown's Case*). (1)

LORD ALVERSTONE C.J. Before dealing with the real point raised in this case, I think it right to say a few words with reference to *Kent* v. *Fittall*. (2) I do not know whether any report of our judgment when the case was before us was referred to in the Court of Appeal. No reference is made in the report of the proceedings before the Court of Appeal to any reasons on which we based our decision. It is quite possible that in the opinion of the Court of Appeal those reasons were wrong, but it would have been more satisfactory if the real ground on which we had acted had been dealt with in the Court of Appeal, in order that the whole case might be thoroughly understood. As Collins M.R. states, there was no difference of opinion on any point of law between this Court and the Court of Appeal.

I came to the conclusion in *Kent* v. *Fittall* (3) that the votes could not be allowed because I could not construe as a question of fact the finding of the revising barrister in the same way as it was construed by the Court of Appeal. As far as I know, there

(1) (1894) 29 Ir. L. T. 81. (2) [1906] 1 K. B. 60.
(3) (1905) 1 Smith's Reg. Cas. 417.

is nothing which would lead anyone to the conclusion that I thought (if I said anything of the sort I said it wrongly) that where it is found as a fact that the landlord has no control, the mere fact of his residence would be conclusive, although, of course, it is a point to be considered in dealing with the question of control. I mention that in order to prevent, so far as I can, any misunderstanding about the case on the part of revising barristers. It seems to me that in every case it is a question of fact, and I venture to read one passage from my judgment in *Kent* v. *Fittall.* (1) The passage is as follows: "If Mr. Foote is right in his contention that this case is based upon a finding of fact that the landlord has no control over the house, and that he has so severed his position as occupier from that of landlord that his residence there has nothing to do with any control over any part of the house as such, I think that perhaps he has made out a special case which possibly might not fall within the clear rule which I tkink is laid down by the cases in the Court of Appeal. But I cannot think that the revising barrister meant to state that; and certainly I do not think we ought to construe the case as finding in that way, unless there is very clear indication of it. The broad ground on which I think it is quite impossible to come to that conclusion is that this relates to no less than 2595 occupiers. That means some hundreds of houses. To suggest that in every one of those cases it is found as a fact that the landlord does not reside there in order to have some control over his house, seems to me to be a supposition which is too extravagant to ask us to adopt on a case so stated. But, in justice to the revising barrister, who has stated the case extremely fairly, I have no doubt in my own mind that what he meant to do was to state all the facts, and then to say that he came to the conclusion that neither on these facts, nor on any deduction of fact he drew from them, nor in law, was there on the part of the landlord such general control over the house as would make the decisions of the Court of Appeal binding upon him." Now, it is that part of my judgment with which I understand the Court of Appeal to have entirely differed. By their decision I am

(1) 1 Smith's Reg. Cas. 417.

1906

DOUGLAS v. SMITH.

Lord Alverstone C.J.

bound, and if the Court of Appeal considered that the statement made with regard to one person, though it related to 2595 others, must for the purpose of the argument be taken as having found that in every one of those 2595 cases the landlord had no control, not only should I not differ from, but should express my humble acquiescence in, the view taken by the Court of Appeal. It seemed to me a difficult way of dealing with what I may call a test case. However, the Court of Appeal said that revising barristers must themselves find the facts with regard to the particular tenements, and that they have not the power, which I thought they had, of stating facts from which the Court would be at liberty to draw inferences of fact.

I have made those observations because they have a direct bearing upon the way in which the present case is stated by the revising barrister. Upon the point raised by the facts stated in the document "B" I express no final opinion, because it has not been argued; but if it were to be taken that the revising barrister had accepted as facts the statements in paper "B," and that he had held that notwithstanding the truth of those statements the voter must be treated as a lodger, I think that the onus would have rested on the respondent to have shewn that that view was consistent with *Kent* v. *Fittall.* (1) I do not express any opinion as to what our decision upon that point would be, as I have not heard any argument on it. It seems to me that it would be unfair to the revising barrister to assume that he accepted all the statements on paper "B" as being true, and yet said that *Kent* v. *Fittall* (1) had no bearing on the matter and that the appellant must be treated as being a lodger.

The sole point for our decision is whether, there being nothing before the revising barrister but the paper "B," there was evidence, upon which he was bound to act, rebutting any finding of fact he had previously come to. In my opinion there was not. The revising barrister has a discretion in these matters, and is not bound by the strictest rules of evidence. He may take a statement made to him in an individual or particular case by an agent on information the agent has received, and he clearly is not bound to accept the answers to a printed circular as evidence

(1) [1906] 1 K. B. 60.

1906

DOUGLAS v. SMITH.

Lord Alverstone C.J.

in an individual case. I am therefore of opinion that the revising barrister was right in saying that he was not bound to hold the document "B" sufficient, and, therefore, taking the view he did, that he had power to expunge the vote.

On behalf of the appellant it was also contended that there was no ground upon which the revising barrister could require any rebutting evidence, inasmuch as there was no evidence before him on which he could come to the conclusion that the objector had made out a prima facie proof of his objection. It was contended that the revising barrister's findings of fact were not sufficient to throw the onus upon the appellant within the meaning of s. 28 of the Act of 1878.

If that point could have been made good, I think the contention might have been raised on behalf of the appellant that the vote was not properly expunged. The first finding excludes the necessity of examining the decisions which have been given with regard to flats in order to consider whether they would be conclusive in favour of the appellant if they applied. I know of no case which says that the revising barrister's first finding of fact is not a matter which he ought to take into consideration in dealing with the question. The Legislature has created a lodger and an occupier class of voter. The judgments in *Kent* v. *Fittall* (1), *M'Daid* v. *Chambers* (2), and other cases shew that under some circumstances the two classes may to some extent overlap, and that persons who prima facie might be thought to be only lodgers may turn out to be entitled to an occupation vote. The judgment of the Court of Appeal in *Kent* v. *Fittall* (1) decides that the findings of the revising barrister as stated with regard to the particular person in each particular case are conclusive. Those facts in his opinion constituted prima facie evidence that the ground of objection had been proved, the ground of objection being that the appellant was not an inhabitant occupier within the meaning of the Act. Under the circumstances it seems to me that the revising barrister was justified on the facts in coming to that decision. It would be doing scant justice to the revising barrister if we hold that there was no evidence on which he could come to the conclusion that there

(1) [1906] 1 K. B. 60. (2) 29 Ir. L. T. 81.

1906

DOUGLAS v. SMITH.

Lord Alverstone C.J.

was prima facie proof of the ground of objection when the real point taken was that there was sufficient evidence to rebut it. I am therefore of opinion that the revising barrister was right in holding that he was not bound to accept the paper "B" as being sufficient evidence in rebuttal, and that the point taken in this Court on behalf of the appellant that the revising barrister ought not to have held that the facts he found were prima facie proof of the ground of objection is not sound. In my opinion the revising barrister may well have come to that conclusion rightly, and I see nothing upon the case stated by him to shew that he has come to a wrong conclusion. For these reasons I think that in this case—which does not raise the points decided in *Kent* v. *Fittall* (1)—the appeal must be dismissed.

RIDLEY J. I agree. I think the revising barrister, having found as a fact that the landlord resided in the house, was right in holding that that was prima facie proof—though no more—of the fact that the claimant was not an inhabitant occupier. Thereupon there was put before him the paper "B" containing the form of questions and the answers thereto. In my opinion it is quite impossible for us to say that he was wrong in holding that the production of that paper was not sufficient to rebut the prima facie proof of the ground of objection. In all these cases it must be for the revising barrister to deal with the facts before him, and on this occasion I think, speaking for myself, that he dealt with them rightly.

DARLING J. I am of the same opinion. The view I take of this case is as follows: A claim having been made by this particular voter, it is, I think, not immaterial to notice that he had claimed in respect of this house both as a person occupying a dwelling-house and also as a lodger in the same house. That would embarrass the revising barrister at once. He might naturally think that there was a good deal of doubt about this claim; the same person who claimed that he was entitled as occupying a dwelling-house also claimed that he was subject to all those incidents of a holding which would make him a lodger. The revising barrister took notice of that and made a note of it

(1) [1906] 1 K. B. 60.

1906

DOUGLAS v. SMITH.

Darling J.

in the margin of the case. The appellant, therefore, being a person living in this house—and apparently doubtful himself whether he was the occupier of the dwelling-house or merely a lodger in another man's dwelling-house—a notice of objection was given to him, and I think that whoever gave this notice of objection thoroughly appreciated the grounds of the judgments given in this Court by Lord Alverstone C.J., Wills J., and myself in *Kent* v. *Fittall* (1), as well as the reasons given by the Court of Appeal. (2) After having carefully compared our judgments with those of the Court of Appeal I am unable to see that, as to the law, there is any difference between the reasons we gave and those of the Court of Appeal; certainly not between the judgments of Wills J. and myself and those of the Court of Appeal, for we seem to have fully realized—and so, I think, did Lord Alverstone C.J.—that the crucial and determining question was not "Does the landlord reside upon the premises?" but "Has he or has he not control?"

Now the respondent who gave this notice thoroughly appreciated that, for head 1 of the grounds of his notice of objection is that the appellant had "not occupied the qualifying premises as owner or tenant for twelve months immediately preceding July 15 in this year." That says in effect that "for twelve months immediately preceding July 15 in this year you have not been the inhabitant occupier of the dwelling-house." That paragraph, taken alone, might be ambiguous, but the notice also contains head 5, which gives the reasons. It says: "That within such period you were a lodger in apartments in a dwelling-house; that such apartments were not occupied by you free of any control of the landlord." Now that is the real question which had to be decided in *Fittall's Case*. (2) The question being present to the mind of respondent when he gave the notice of objection, the revising barrister had that objection before him, and found as a fact "That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house." I think that finding is important. The house was not a place constructed to be let off in compartments like tenement dwellings;

(1) 1 Smith's Reg. Cas. 417. (2) [1906] 1 K. B. 60.

1906

DOUGLAS v. SMITH.

Darling J.

it was an ordinary dwelling-house. The revising barrister also found "That the immediate landlord to whom the person in question paid rent resided in the house"; and "That such landlord was rated for the entire house as a separate tenement." Thereupon it was submitted, in support of the objection, that these facts were prima facie proof of the ground of objection. It is to be observed that the revising barrister did not hold that those facts were proof, but that they were "prima facie proof of the ground of objection (that is to say, that the person in question was not an inhabitant occupier as tenant of a dwelling-house within the meaning of the Acts, but that he had merely occupied the premises as a lodger)." In one of his claims the appellant himself said he occupied as a lodger. The revising barrister therefore up to that point had held that there was a prima facie case that the respondent was really a lodger, and not a person separately occupying a dwelling-house. That expression of opinion by the revising barrister resulted in the paper marked "B.," signed by the appellant and his landlord, being produced on behalf of the appellant, but no further evidence was tendered. The position at that stage, therefore, was that the question present to the mind of the revising barrister being "Has the person who resides on the premises the control of a landlord over what is said to be the separate tenement of the appellant?" all that the revising barrister finds in the paper marked "B" that is really material to that question is as follows: "Has the landlord any control whatever over your rooms?—No." Now that question and the answer to it contain the very point, and might have satisfied the revising barrister that the appellant was an inhabitant occupier. He might have said, "On that which I accept as evidence I am perfectly satisfied, and I therefore give the vote to the claimant." If the revising barrister had done that I do not think we could have interfered with his decision. But he did not do that. He followed the procedure provided by s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, which, amongst other things, provides that "The prima facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground

for believing that the objection is well founded." That had been done. The sub-section continues, "and that by reason of the person objected to not being present for examination"—he was not present for examination, he only tendered the paper marked "B," and the revising barrister has told us definitely to-day, and I think that is important, that he did not accept those things alleged in the paper as being facts—"or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to." Now all that the revising barrister has said is in effect, "Prima facie I think that what was proved before me by the objector cast the onus upon the claimant to give further evidence; he gave no further evidence except that paper 'B'; that paper did not satisfy me that the material fact was proved; that is, that the landlord did not retain any control over the demised premises."

Now the question which the revising barrister ought to consider, in order to see whether the landlord did or not retain any control over the premises, has been referred to in many cases, and particularly by Wills J. in his judgment in *Kent* v. *Fittall.* (1) He says: "It seems to me that what was said in every one of" the judgments in *Bradley* v. *Baylis* (2) "is in substantial agreement with the judgment which stands first, that of Jessel M.R."—nobody disputes that that judgment is good law—"namely, that where the owner does not let the whole of the house, but resides in part of it, and gives to the inmates merely a right to ingress and egress to the passages, staircase, and outer door, and retains to himself the general control—not that he exercises any personal control, but that he retains himself the right of general control which must flow from his own demising of the separate rooms and granting an easement as attached to each of them—and 'a right' (he goes on) 'to interfere, a right to turn out trespassers,' and so on, then the tenant is a lodger. That was the view which he entertained, and Brett L.J. said, 'If the owner of the house reserves to himself a control over it'—and here follow the words of the judgment, which seem to be important with reference to a case like this—'which he does if he resides in part of it and where there is only the use of the passages and staircases given

(1) 1 Smith's Reg. Cas. 417. (2) (1881) 8 Q. B. D. 195.

1906

DOUGLAS v. SMITH.

Darling J.

to the inmates, to whom he lets the rest of it.'" Wills J. then says, "and the other Lords Justices delivered similar judgments."

I have read carefully the judgment that I gave in *Kent* v. *Fittall.* (1) I do not see there is a single word in it that I need attempt to recall, and I myself alluded to this point in this way: "I think it is plain from the cases that have been read, that the mere fact that the owner of a whole house actually resides upon the premises shews that that in itself is almost a sufficient compliance with the requirements laid down by Maule J. in *Toms* v. *Luckett.*" (2) I particularly desire to draw attention to the word "almost" in that passage. I do not say—nor has any other judge—that mere residence by the landlord is proof that he has control; but I think all the authorities have said, as I pointed out in the passage I have just read, that it amounts to "almost" a sufficient compliance with the requirements laid down by the cases, and, if that be so, the revising barrister had before him prima facie proof that the landlord had control over these premises. There being prima facie proof before the revising barrister, the burden was cast upon the claimant to displace the prima facie proof, and he did not attempt to displace it except by the production of the paper "B," offering no other evidence. The revising barrister was confronted with the fact—to which he attached importance—that the same person who was asking him to hold that he occupied a separate dwelling-house was at the same time asking him to say (notwithstanding what was on paper "B") that he had not a separate dwelling-house but was a lodger in the house of the landlord. In the circumstances I think the revising barrister was right in saying "I had prima facie evidence before me that the claimant was a lodger; that evidence was not displaced by what was offered to me to rebut it." He was therefore, in my opinion, justified in finally arriving at the conclusion (the prima facie evidence not being rebutted) that the objection was well founded.

Appeal dismissed.

Solicitors for appellant: *Radford & Frankland.*

Solicitor for respondent: *W. Herbert Bishop.*

(1) 1 Smith's Reg. Cas. 417. (2) (1847) 5 C. B. 23.

J. E. A.

LARCOMBE *v.* SIMEY.

1906
Nov. 7.

Parliament—Registration — Service Franchise — Inhabitant Occupier — Compulsory Absence—"Office, Service, or Employment"—Appeal from Decision of Revising Barrister—Nomination of Clerk to County Council as Respondent—Costs—Parliamentary and Municipal Registration Act, 1878 (41 *& 42 Vict. c.* 26), *s.* 38—*Representation of the People Act,* 1884 (48 *& 49 Vict. c.* 3), *s.* 3—*Electoral Disabilities Removal Act,* 1891 (54 *& 55 Vict. c.* 11), *s.* 2.

A break of inhabitancy where the occupier has not the legal right to return has the same effect in disqualifying the occupier for the service franchise as for the ordinary dwelling-house franchise.

The voter, a coachman, occupied a dwelling-house by reason of his employment, but was compulsorily absent from the house for more than four months during the qualifying period. His wife and family resided with him during the qualifying period, but they might have been left at the dwelling-house if he had wished during the period of his absence:—

Held, that he was not entitled to be registered on the list of voters for the parish, inasmuch as he was placed in the same position as an inhabitant occupier by s. 3 of the Representation of the People Act, 1884, and s. 2 of the Electoral Disabilities Act, 1891, could only protect him in respect of compulsory absence for not more than four months during the qualifying period.

Where the clerk to a county council is nominated under s. 38 of the Parliamentary and Municipal Registration Act, 1878, by a revising barrister as respondent to an appeal from his decision, the High Court has jurisdiction under the section to grant the appellant, if successful, his costs, even though the respondent does not appear.

Case stated by the revising barrister for the Wellington division of Somerset.

At a court held by the revising barrister on October 1, 1906, the appellant William Larcombe objected to the name of George Goodchild being retained on division 2 of the list of electors for the parish of Luccombe, in the Wellington division of Somerset, on the ground that he had not occupied the qualifying property as described in the list for twelve months preceding July 15, 1906.

Goodchild was coachman to Charles Edward Chadwyck-Healey, K.C., who was the occupier of a house and grounds known as New Place, in the said parish.

The house occupied by Goodchild was called Stable Cottage,

1906

LARCOMBE v. SIMEY.

and was situate in the grounds of New Place, and was occupied by Goodchild by reason of his service with Charles Edward Chadwyck-Healey.

Goodchild came down to New Place and resided there with his wife and family from the commencement of July, 1905, to October 20, 1905, and again towards the end of December, and stayed until February 1, 1906.

He could send his wife and family down to Stable Cottage when he liked, and could leave them there during any time of the year he wished while he was away with his master, but during the qualifying period between July 15, 1905, and July 15, 1906, his wife and family had only resided at Stable Cottage during the time he was himself there. He would have to return to Stable Cottage at any time if sent there by his master.

By s. 3 of the Representation of the People Act, 1884: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment . . . . he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant." By s. 2 of the Electoral Disabilities Removal Act, 1891: "A person shall not be disqualified from being registered—(*a*) in the parliamentary register of electors for a county or borough in respect of his inhabitant occupation of a dwelling-house . . . . by reason only that during part of the qualifying period not exceeding four months at any one time, he has in the performance of any duty arising from or incidental to any office, service, or employment held or undertaken by him been absent from his dwelling-house. . . . ."

The revising barrister was of opinion that the Act of 1891, being one to remove certain disabilities, did not apply to such a case as the above; that if it did so, every coachman or servant who occupied a dwelling-house by virtue of his service and resided more than four months of the qualifying period in one house and more than four months in another house, and had to change houses whenever his master ordered him to do so, would be disqualified from being registered as a parliamentary elector in either place in which he had resided.

He therefore held that Goodchild was entitled to be registered in the list of voters for the parish of Luccombe.

If the Court should be of opinion that his decision was wrong, the register was to be amended by erasing the name of Goodchild from the list.

The revising barrister (by virtue of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 38), appointed William Larcombe, the clerk to the county council of Somerset, respondent.

Larcombe appealed.

Raymond Asquith, for the appellant. A break in the occupation where the occupier has not the legal right to return has the same effect in disqualifying the occupier for the service vote as for the occupation vote. In Rogers on Elections, vol. 1, 16th ed. at pp. 103, 104, citing *Rex* v. *Mitchell* (1), it is said that "this decision has not, however, been followed in recent cases, and they have laid down that, in order to obtain a constructive inhabitancy, there must not only be the intention to return after a temporary absence, but also the power to return at any time without breach of a legal obligation." In the present case Goodchild was absent compulsorily for more than four months, and is therefore not within s. 2 of the Electoral Disabilities Removal Act, 1891: *Ford* v. *Elmsley* (2); *Ford* v. *Barnes*. (3) The man could only have returned to Somerset by leave of his master. As the clerk to the Somerset County Council was nominated as respondent under s. 38 of the Parliamentary and Municipal Registration Act, 1878, there is jurisdiction under that section, if the appeal is successful, to grant the appellant his costs, even if the respondent does not appear, although that could not have been done under s. 70 of the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18). [*Northallerton Corporation* (*Bilton's Case*) (4) was also referred to.]

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The revising barrister appears to have held that a

(1) (1809) 10 East, 511.
(2) (1885) 16 Q. B. D. 254.
(3) (1885) 16 Q. B. D. 254.
(4) [1869] 1 O'M. & H. 171.

1906

LARCOMBE v. SIMEY.

Lord Alverstone C.J.

voter claiming by virtue of the service franchise under the Act of 1884 is not subject to the same disqualification by reason of compulsory absence as the inhabitant occupier, and therefore did not require the relief afforded by the Electoral Disabilities Removal Act, 1891. He seems to have been pressed by the view that if he were to hold that the Electoral Disabilities Removal Act, 1891, applied to the present case a coachman or servant ordered by his master to occupy two houses for two periods of six months each would not be an elector in either place. I think that that point may have to be considered at some future time. As at present advised, it seems to me that that consequence follows from the language of s. 3 of the Representation of the People Act, 1884.

In *Brooks* v. *Baker* (1) we pointed out that the effect of that section was to make a man an inhabited occupier for the purpose of obtaining a vote although he did not fulfil the qualifications with regard to rating and other matters necessary in the case of an inhabitant occupier. It can, I think, hardly be suggested that a person who obtains his qualification as being deemed to be an inhabitant occupier is not subject to and must not fulfil the conditions which an ordinary inhabitant occupier must fulfil, as for instance the period during which he has resided there, and any other condition which would be necessary to be fulfilled by an ordinary inhabitant occupier before he can obtain his vote. In *Ford* v. *Elmsley* (2) it was decided that if a man, though an inhabitant in the sense of having his furniture on premises and having the right to go there, is compulsorily away, he loses his vote, and, although I am not sure that if this point were now before us for decision for the first time I should quite agree with the view the Court took in *Ford* v. *Elmsley* (2), we are bound by the decision in that case that leaving wife and family in the house is not sufficient to enable the husband to retain his vote if he is absent compulsorily. In the absence of argument on the other side, it seems to me that this must be the true view of the effect of the amending Acts. I do not think that policemen obtain their franchise in any other way than by service. If they were separate inhabitant occupiers, of course

(1) [1906] 1 K. B. 11. (2) 16 Q. B. D. 254.

they might in that way become entitled to their votes; but a very large number of policemen do undoubtedly obtain their qualification as being entitled to the service franchise. By s. 3 of the Police Disabilities Removal Act, 1887 (50 & 51 Vict. c. 9): "A person otherwise entitled to be registered as a voter at parliamentary elections in respect of the occupation of a dwelling-house shall be deemed an inhabitant occupier thereof as tenant notwithstanding his temporary absence therefrom in the execution of his duty as a police officer during a part of the qualifying period, not exceeding four consecutive months." It seems to me that the opening words of that section, taken by themselves, would have included all persons who inhabit a dwelling-house by virtue of their office, service, or employment, and the latter part of the section makes it more clear that the section includes policemen only. The Electoral Disabilities Removal Act, 1891, extended that relief to persons "in the performance of any duty arising from or incidental to any office, service, or employment." I fail to see why the employment of a coachman does not come within these words. Therefore, unless it can be shewn that a person qualified as a service franchise voter does not require any protection, s. 2, sub-s. (*a*), of the Act of 1891 applies to him, and it is admitted that Goodchild was absent more than four months. I am unable to see any ground on which, in the face of *Ford* v. *Barnes* (1) and *Ford* v. *Elmsley* (2), it can be satisfactorily argued that a coachman does not require any protection. I think that the result which the revising barrister pointed out follows from occupation as an inhabitant occupier. If he is away compulsorily he loses the character of an inhabitant occupier, and, having lost that character, he is only protected if he brings himself within the remedial Act of 1891. I therefore think that this appeal must be allowed. As the clerk to the county council is respondent, we have power under s. 38 of the Parliamentary and Municipal Registration Act, 1878, to grant the appellant his costs although the respondent has not appeared, whereas, had the clerk to the county council not been appointed respondent, the Parliamentary Voters Registration Act, 1843, s. 70, would have prevented us doing so. The appeal will therefore be allowed with costs.

(1) 16 Q. B. D. 254. (2) 16 Q. B. D. 254.

1906

LARCOMBE v. SIMEY.

RIDLEY J. I am of the same opinion. The matter was somewhat in the nature of a new subject to me, and I at first thought that, under s. 3 of the Act of 1884, the inhabitancy required to confer the service vote might be something different from inhabitant occupation under the Representation of the People Acts. But the decisions are too strong to enable us to come to that conclusion. I think that s. 3 of the Act of 1884 means that the service tenant is to be treated as an inhabitant occupier of the premises of which he is tenant, and if that is so, then the decisions in *Ford* v. *Elmsley* (1) and *Ford* v. *Barnes* (2) as to what break of residence and inhabitancy will disqualify the voter apply. It is true that in *Northallerton Corporation* (*Bilton's Case*) (3) Willes J. treated the matter in a somewhat different way. In that case it appeared that Thomas Bilton was a platelayer and worked on the railway; he had a house in the borough where his wife and daughter lived, but he himself only occasionally came and slept at home. The vote was challenged on the scrutiny, but the learned judge said the vote would do at present, because the wife resided in the borough. I do not think we can take that as an authority so far as it is opposed to the subsequent cases. It is possible that a vote like that in *Northallerton Corporation* (*Bilton's Case*) (3) might still be held good, the man's wife and family giving him the necessary inhabitancy in the borough, whilst he himself was living on the railway in connection with his work. We must follow the later decisions: if there be a compulsory break of residence, one which is necessary—a residence which he cannot resume without a breach of contract—the service voter is disqualified. He is within the meaning of the Electoral Disabilities Removal Act, 1891, and if absent for more than four months he loses his vote. The appeal must therefore be allowed.

DARLING J. I am of the same opinion.

Appeal allowed with costs.

Solicitors for appellant: *Russell-Cooke & Co.*

(1) 16 Q. B. D. 254. (2) 16 Q. B. D. 254.
(3) 1 O'M. & H. 171.

J. E. A.

CHANNEL COALING COMPANY *v.* ROSS AND ANOTHER.

1906
Nov. 16.

County Court—Practice—Prohibition—Alternative Remedy—Service out of the Jurisdiction—Action founded on Breach of Contract—Defendant resident in Scotland—County Court Rules, 1903, *Order* VII., *rr.* 41 (*e*), 49.

The Court, in the exercise of its discretion, will prohibit, on the ground of absence of jurisdiction, further proceedings in a county court action founded on an alleged breach of contract within the district, where, the defendant being resident in Scotland, the county court judge has, contrary to Order VII., r. 41 (*e*), of the County Court Rules, 1903, made an order for the service of the summons on the defendant in Scotland, although there is an alternative remedy open to the defendant by way of an application to the county court judge, under Order VII., r. 49, to set aside the service or to discharge the order authorizing such service.

APPEAL of the defendants from Sutton J. in chambers refusing to issue a writ of prohibition.

The plaintiffs were a company carrying on business at Dartmouth, within the Totnes and Paignton district of the county court of Devonshire. The defendants resided and carried on business at Greenock, in Scotland, and nowhere else. The plaintiffs obtained leave under s. 74 of the County Courts Act, 1888, to enter a plaint in the Totnes and Paignton county court district against the defendants in respect of a claim for the price of coals supplied to the defendants' ship when lying in Dartmouth Harbour, on the ground that the cause of action arose wholly or in part in that district. A summons was issued, and the plaintiffs obtained leave from the county court judge under Order VII., r. 41 (*c*) (1), of the County Court Rules, 1903, for

(1) County Court Rules, 1903, Order VII., r. 41: "Service out of England and Wales of a summons or notice of a summons may be allowed by the court whenever—

"(*c*) any relief is sought against any person residing or carrying on business within the district of the court, or sued in the court pursuant to leave granted under s. 74 of the Act; or

"(*e*) the action is founded on any breach or alleged breach within the district of the court of any contract wherever made which, according to the terms thereof, ought to be performed within England or Wales, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

Order VII., r. 49: "A defendant served with a summons or notice of a summons under this Order may apply, on notice, to the judge to set aside the service of such summons or notice upon him, or to discharge the order authorizing such service."

REFERENCE ONLY

1906

CHANNEL COALING COMPANY v. ROSS.

service of the summons on the defendants in Greenock, and the summons was served on them there.

The defendants applied to the judge in chambers for a writ of prohibition to issue directed to the judge of the Devonshire county court and the plaintiffs to prohibit them from further proceeding in the matter of the action on the ground that the judge had no jurisdiction to hear or determine the action.

Sutton J. refused the application.

The defendants appealed.

Leck, for the defendants. The prohibition ought to issue. Service out of the jurisdiction in county court cases is regulated by Order VII., r. 41, of the County Court Rules, 1903. This case comes within clause (*e*), not clause (*c*), of r. 41, and by that clause power to allow service out of the jurisdiction is expressly withheld in a case like the present, where the defendants are domiciled or ordinarily resident in Scotland. The language of Order VII., r. 41 (*e*), is practically identical with that of Order XI., r. 1 (*e*), of the Rules of the Supreme Court, and it was held in *Lenders* v. *Anderson* (1) that there is no power to allow service of a writ out of the jurisdiction in actions under Order XI., r. 1 (*e*), where the defendant is domiciled or ordinarily resident in Scotland.

Lewis Thomas, for the plaintiffs. The county court has prima facie jurisdiction to entertain this action, for it is a claim for the price of goods sold and delivered within the county court district. The defendants' application for a writ of prohibition was premature. Under Order VII., r. 49, of the County Court Rules (which is similar to Order XII., r. 30, of the Rules of the Supreme Court), a defendant who is served with a summons under Order VII. may apply to the county court judge to set aside the service, and the defendants' proper course was to apply under that rule, and, if necessary, to appeal from the county court judge's decision. The granting of a writ of prohibition to an inferior Court is discretionary: *Broad* v. *Perkins* (2); and the Court will not exercise its discretion in favour of a defendant when there is another and a more simple remedy open to him,

(1) (1883) 12 Q. B. D. 50. (2) (1888) 21 Q. B. D. 533.

as there is here under Order VII., r. 49. *Lenders* v. *Anderson* (1) was not a case of prohibition, and the decision is, therefore, no authority for saying that the Court is bound in this case to grant the writ.

Leck, in reply, referred to *Farquharson* v. *Morgan* (2) and *Alderson* v. *Palliser*. (3)

LORD ALVERSTONE C.J. I have come to the conclusion that the county court had no jurisdiction to make an order for the service of the summons on the defendants in Scotland. The action was brought to recover the price of goods sold and delivered to the defendants' ship lying in Dartmouth Harbour. The defendants carry on business in Greenock, and at no other address. The question which we have to consider, therefore, is whether the county court judge has jurisdiction to entertain such an action as this, and to allow service of the summons on the defendants in Scotland. The answer to that question depends upon the construction of Order VII., r. 41 (*e*), of the County Court Rules. It has been said, and rightly said, that where a plaintiff is suing, as in this case, for the price of goods delivered and the money is payable to him within the district of a county court, prima facie that court has jurisdiction. But the case of *Lenders* v. *Anderson* (1) shews that the High Court under Order XI., r. 1 (*e*), of the Rules of the Supreme Court would not have allowed the writ to be served on the defendants in Scotland under similar circumstances as in the present case, and there is no difference between the language of the two rules. Therefore, unless we can put a different construction on these proceedings or on the language of Order VII., r. 41 (*e*), the county court judge had no power to allow the service of this summons on the defendants. I am unable to accept the view that on the face of these proceedings the county court judge had jurisdiction. Mr. Thomas argues that prohibition should not be granted because of the alternative procedure under Order VII., r. 49, of the County Court Rules, which he urges ought to prevent us from exercising our discretion in favour of the defendants in the present case. That rule is as follows: "A

(1) 12 Q. B. D. 50. (2) [1894] 1 Q. B. 552.
(3) [1901] 2 K. B. 833.

REFERENCE ONLY

1906

CHANNEL COALING COMPANY v. ROSS.

Lord Alverstone C.J.

defendant served with a summons or notice of a summons under this Order may apply, on notice, to the judge to set aside the service of such summons or notice upon him, or to discharge the order authorizing such service." There is a similar rule in the High Court, where, of course, a writ of prohibition has no application, namely, Order XII., r. 30, which gives power to a defendant to apply to the Court to set aside an order for service out of the jurisdiction, the object being to enable the question of jurisdiction to be decided in an easy and expeditious manner. With regard to the county court rule, it is to be observed that Order VII., r. 49, says that a defendant "may apply," and if it had been intended that an application under that rule was to be substituted for the remedy by way of prohibition, I should have expected to find that intention much more clearly expressed. On the broad principle that it is established that the county court is acting beyond its jurisdiction, I am of opinion that the case is one in which the Court ought not to refuse to issue a writ of prohibition. The case would to my mind have been different if it could have been suggested that there was any further evidence to be adduced which would have made it more expedient for the matter to be determined by means of an application to the county court judge under Order VII., r. 49.

For these reasons I am of opinion that the appeal should be allowed and that the writ of prohibition should issue.

DARLING J. I am of the same opinion. It seems to me that we have power here to prohibit that which the county court judge has authorized to be done, and the only question to be determined is whether we ought or ought not to exercise that power. I agree with counsel for the respondents that although we can order the writ of prohibition to issue we are not always bound to do so, and that there may be circumstances which would satisfy the Court in a particular case that it should not do so. The only reason suggested against granting a prohibition in this case is that, although it is not now contended that what was done by the county court judge was rightly done, Order VII., r. 49, gives an alternative remedy. It does so. It enables those persons in Scotland who have been wrongly served to go

to the same county court by which the service was directed and have the order authorizing service set aside. But I do not think that disables the defendants from coming here and asking us to exercise our jurisdiction to issue a writ of prohibition, nor do I see sufficient reason why we should not exercise our power to that effect.

1906

CHANNEL COALING COMPANY v. ROSS.

Darling J.

Appeal allowed.

Solicitor for plaintiffs: *W. Ashford, for Hockin & Scholefield, Dartmouth.*

Solicitors for defendants: *Thomas Cooper & Co.*

F. O. R.

In re BENNETT.
Ex parte THE OFFICIAL RECEIVER.

1906

Nov. 19, 27.

Bankruptcy—Undischarged Bankrupt — After-acquired Property—Death of Bankrupt Intestate—Distribution amongst Next of Kin—Intervention of Trustee in Bankruptcy—Refunding to Trustee by Next of Kin.

An undischarged bankrupt effected policies on his life and died intestate and undischarged. The administrator of his estate, without notice of the bankruptcy, distributed the policy moneys amongst the bankrupt's next of kin before the trustee in bankruptcy intervened:—

Held, that the administrator was not personally liable to the trustee for the moneys he had distributed, but that the next of kin must refund to the trustee the shares they had respectively received.

The doctrine of *Herbert* v. *Sayer*, (1844) 5 Q. B. 965, and *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262, applied.

In re Ball, [1899] 2 I. R. 313, distinguished.

The dictum of Byrne J. in *Hunt* v. *Fripp*, [1898] 1 Ch. 675, that a party, even with notice of the bankruptcy, may deal honestly and for value with the bankrupt before the trustee intervenes, approved.

THIS was an application by the official receiver, as trustee, for payment to him of a sum of money on the ground that it formed part of the estate of the debtor under these circumstances.

On December 8, 1896, the debtor was adjudicated bankrupt. His statement of affairs disclosed no assets, and no estate was realized, and the official receiver became the trustee. The debtor remained undischarged, and died intestate in October,

1906

BENNETT, *In re.* THE OFFICIAL RECEIVER, *Ex parte.*

1905. About a year before his death he effected two small policies on his life and paid the premiums out of his earnings as a commercial traveller. On his death his brother, Percy Bennett, in November, 1905, took out letters of administration to his estate and effects and swore them at 304*l.* 15*s.*, being, in fact, the amount due on the two policies. The next of kin of the debtor were seven in number, and, after deducting the costs of administration, the amount of each share was 38*l.* 7*s.* The administrator was one of the next of kin, and in due course, and not knowing of the bankruptcy, he distributed the estate, retaining his own share and the shares of two of the next of kin who were infants, and paying over to the other five next of kin their respective shares. Soon afterwards the official receiver heard of the death of the bankrupt and that moneys due on two policies on his life effected after the bankruptcy had been received by his administrator, and thereupon he claimed payment of these moneys from the administrator as being the bankrupt's estate. The administrator declined, on the ground that he had in due course of law and in accordance with his administration bond administered the estate and distributed it amongst the parties entitled thereto as the next of kin.

In June, 1906, Bigham J., on the application of the official receiver, ordered the administrator to pay over his one-seventh that he had retained and also the two-sevenths that he held for the infants, making together 115*l.* 1*s.*, to the official receiver, on the ground that such moneys formed part of the estate of the bankrupt, but held that the administrator was protected by the administration bond and ought not to be ordered to pay over again the shares that he had in good faith paid away to the five other next of kin.

The official receiver now applied that Herbert Bennett, one of the five next of kin who had received his share, might be ordered to pay over such share to him on the ground that it formed part of the estate of the bankrupt.

Whinney, for the official receiver. The Court has held that these policy moneys are part of the bankrupt's estate, and only a bona fide purchaser for value and without notice has a good title

against the trustee in Bankruptcy: *Herbert* v. *Sayer* (1); *Cohen* v. *Mitchell.* (2) But probably a person who deals honestly and for value with a bankrupt would be protected although he has knowledge of the bankruptcy: *Hunt* v. *Fripp.* (3)

Tindale Davis, for Herbert Bennett. The trustee's intervention comes too late. The administrator dealt with the estate in good faith before the trustee intervened, and the next of kin received their shares under the Statute of Distributions in good faith and without notice.

[BIGHAM J. The administrator stands in the shoes of the bankrupt, and was held not liable because he paid away the money before the trustee intervened.]

In the case of *In re Ball* (4) the payment of a legacy by executors, acting bona fide, to a bankrupt, before the trustee intervened, was held good.

[BIGHAM J. That is not this case. The trustee here says, "The money in your pocket is part of the bankrupt's estate, and I ask you to pay it to me."]

If the next of kin has sued the administrator for this money, before the trustee intervened, he would have had no defence and must have paid them. No property passes to the trustee until he intervenes, and it is submitted that under the circumstances it is now too late for him to intervene and seek to follow the money. The observations of Fry J. in *Cohen* v. *Mitchell* (2), as to payments by a bankrupt to a person who receives them in good faith, are in my favour.

Whinney, in reply.

Cur. adv. vult.

Nov. 27. BIGHAM J. On December 1, 1896, a receiving order was made against the debtor, and on December 8, 1896, he was adjudicated bankrupt. The official receiver became the trustee. There were no assets of any value, and the liabilities were about 300*l.* The bankrupt never obtained his order of discharge, and on October 26, 1905, he died. His brother, Percy Bennett, took out letters of administration. The estate

(1) 5 Q. B. 965.
(2) 25 Q. B. D. 262, 270.
(3) [1898] 1 Ch. 675, 683.
(4) [1899] 2 I. R. 313.

1906

BENNETT, *In re.* THE OFFICIAL RECEIVER, *Ex parte.*

Bigham J.

and effects were sworn at a sum of 304*l.* 15*s.*, being the proceeds of one or more policies of insurance which the bankrupt had taken out on his own life. This money the administrator proceeded to distribute among the next of kin. The respondent to this motion is one of the next of kin, and has received as his share a sum of 38*l.* 7*s.* The official receiver by the present motion claims a return of this sum as forming part of the after-acquired property of the deceased bankrupt. The respondent claims to retain it on the ground that he received it in good faith and before the official receiver had intervened. Sect. 44 of the Bankruptcy Act, 1883, provides that the property of a bankrupt divisible amongst his creditors shall comprise all property which may be acquired by or devolve upon him prior to his discharge. It is not disputed that the fund in question comes within this definition, nor is it disputed that the matter is to be dealt with as if the bankrupt were still alive. It is merely said that, the respondent having received the money in good faith—that is, without any notice of the existence of the bankruptcy—and having received it before the official receiver had done anything to assert his better title, he, the respondent, is entitled to keep the money. In support of this contention were cited the cases of *Herbert* v. *Sayer* (1), *Cohen* v. *Mitchell* (2), and *In re Ball.* (3) The first of these cases decides that a bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee, and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes. In that case Tindal C.J. says (1): "All future property and contracts vest in the assignees by the words of the statute 6 Geo. 4, c. 16, ss. 63, 127, and by the construction put by the Courts on the words of the older statutes. But there must be property in the *bankrupt*, or *contracts with him*, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property

(1) 5 Q. B. 965, 981. (2) 25 Q. B. D. 262.
(3) [1899] 2 I. R. 313.

or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The Legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt bona fide made or entered into without notice of the act of bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings or transactions *after* the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts, for the assignees, who may, whenever they please, disaffirm his act, but, until they do so, his acts are all valid." The second case of *Cohen* v. *Mitchell* (1) shews how and in what circumstances a third party dealing with the bankrupt with respect to after-acquired property may obtain a good title to such property as against the trustee. The law on this point is stated in the judgment of Lord Esher. (1) He says: "I am prepared to lay down a proposition which has been agreed upon by us all, and which has been written down by my brother Lopes. It is this—until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." The whole point here is that the transaction must be *for value*. The bankrupt, to use the expression of Tindal C.J. in the case of *Herbert* v. *Sayer* (2), is an "agent of the trustee," but he is an agent *to deal* with the property, not to give it away. It follows that a person who merely receives after-acquired property from a bankrupt, however honest he may be, cannot keep it as against the trustee. If the law were otherwise, the bankrupt could defeat the operation of s. 44 by giving away to any stranger after-acquired

(1) 25 Q. B. D 262, 267. (2) 5 Q. B. 965.

1906

BENNETT, *In re.* THE OFFICIAL RECEIVER, *Ex parte.*

Bigham J.

property the moment be became possessed of it. The two cases referred to were meant to prevent the hardship which would result if bona fide purchasers for value from the bankrupt were not protected. The third case of *In re Ball* (1) merely decides that a person paying an undischarged bankrupt money to which the bankrupt has become entitled since the bankruptcy, and doing it without notice of the bankruptcy, cannot be compelled by the trustee to pay over again. It is a decision to the effect that a bankrupt is an agent of the trustee to receive after-acquired property before the trustee intervenes. It has no application to the present case. Here the respondent gave no value for the money he received. He is, therefore, not entitled to retain it, and I must make the order asked for, with costs.

Before parting with this case I wish to refer to the observation of Byrne J. in his judgment in *Hunt* v. *Fripp* (2), where he says that a party dealing bona fide, that is, "honestly," and for value with a bankrupt is under no obligation, although he knows of the bankruptcy, to go to the trustee to make inquiries. I think that observation is right, but it is not necessary for me to deal further with the point in this case.

Solicitors: *Sheffield, Son & Powell*; *J. T. Campion, Henley-on-Thames.*

(1) [1899] 2 I. R. 313. (2) [1898] 1 Ch. 675, 683.

H. L. F.

In re VAN LAUN.
Ex parte PATTULLO.

1906

Oct. 29; *Nov.* 12, 27.

Bankruptcy—Solicitor and Client—Cash Accounts—Draft Bills of Costs agreed—Contentious Business—Delivery of Detailed Bills waived—Stated Account—Mortgage to secure agreed Balance of stated Account—"Payment"—Bankruptcy of Client—Proof by Solicitor—Trustee's Title to go behind Mortgage and stated Account and require Particulars with Vouchers—The Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 41—*The Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 10—*The Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 22.

The giving of a mortgage with a covenant to pay for the agreed amount of a solicitor's bill of costs is not equivalent to payment of the bill within the meaning of s. 41 of the Solicitors Act, 1843.

Ex parte Turner, (1854) 24 L. J. (Ch.) 71; S. C. sub nom. *In re Boyle*, 5 D. M. & G. 540, explained.

A solicitor from time to time rendered to his client a debtor and creditor cash account, and his draft unsigned bill of costs for contentious business. On each occasion the client waived the delivery of a signed bill and discussed and agreed the amount of the draft bill, which amount was then debited against him in the cash account and a balance was struck, and the client wrote at the foot of the cash account "I agree this account" and signed it. On the third occasion the client gave the solicitor a mortgage for the agreed balance of the stated cash account, which for the main part represented the agreed sum for costs, and covenanted to pay it with interest. More than twelve months afterwards the client became bankrupt, and the solicitor claimed to prove for the principal and interest due under the covenant in the mortgage less the value of the security, and he also claimed to prove for the same principal sum on an account stated:—

Held that, as between the debtor and the solicitor, the carrying of the agreed sums for costs into the cash account and the subsequent statement of account between them was equivalent to payment of the costs within the meaning of s. 41 of the Solicitors Act, 1843, and that there were no special circumstances which entitled the debtor to require delivery of a detailed bill for taxation.

But *held* that, as between the trustee in bankruptcy and the solicitor, the trustee represented the general body of the creditors, and was entitled to go behind the covenant in the mortgage and the stated account and to require satisfactory evidence, before admitting the proof, that the claim for costs represented a genuine debt.

This was an appeal by a creditor against the rejection of his proof by the trustee under these circumstances.

For several years prior to his bankruptcy the debtor was

1906

VAN LAUN, *In re.* PATTULLO, *Ex parte.*

engaged in large commercial and financial transactions, and from March, 1901, to June, 1905, he employed Mr. Chatterton to act as his solicitor. During this period Mr. Chatterton collected for the debtor some 16,000*l.*, of which about 13,000*l.* passed through the hands of Mr. Chatterton, who from time to time rendered to the debtor cash accounts of his receipts and payments, and these accounts were balanced and agreed to on four occasions. The first occasion on which the account was balanced was on March 30, 1903, when a balance of 1354*l.* was shewn in favour of Mr. Chatterton. This balance was arrived at after debiting against the debtor at the foot of the account the sum of 6600*l.* for "my costs up to November 15, 1902, as agreed." The next occasion on which the account was balanced was on July 24, 1903, when, after carrying forward the balance of 1354*l.* and debiting at foot as before a sum of 1801*l.* 7*s.* 1*d.* for "my costs, November, 1902, to June 24, 1903," there remained a balance of 443*l.* 0*s.* 9*d.* due to Mr. Chatterton. The third occasion on which the account was balanced was on January 5, 1905, when, after debiting the said sum of 443*l.* 0*s.* 9*d.* and also a sum of 2932*l.* 1*s.* 5*d.* for costs from June 24, 1903, to December 14, 1904, there remained a balance of 3818*l.* 14*s.* 1*d.* due to Mr. Chatterton.

On January 10, 1905, a deed was executed between the debtor as mortgagor and Mr. Chatterton as mortgagee, whereby, after reciting "Whereas the mortgagor is indebted to the mortgagee for advances made to the mortgagor and moneys paid on his account and for costs in respect of business done and professional services rendered to him by the mortgagee, and an account of such indebtedness up to December 14 last has been stated as between the mortgagor and the mortgagee and has been settled and agreed at the sum of 3818*l.* 14*s.* 1*d.* And whereas the mortgagor has requested the mortgagee to continue to act for him as his solicitor in various matters and as an inducement thereto has agreed to give to the mortgagee such security as is hereinafter contained. And whereas the mortgagee may make further advances to the mortgagor and may pay further sums on his account," the mortgagor covenanted on demand to pay the mortgagee the 3818*l.* 14*s.* 1*d.* with interest at 5 per cent., "and

also on such day as the same shall be ascertained either by agreement or by taxation or shall otherwise be or become due and payable every other sum of money owing or to become owing to the mortgagee from the mortgagor for business transacted for him or for moneys advanced which shall become payable on any other account whatsoever by the mortgagor to the mortgagee with interest thereon in the meantime at the rate aforesaid from time to time of the same being so ascertained or otherwise becoming due and payable; provided that notwithstanding the premises future costs shall be deemed to become owing from the mortgagor to the mortgagee on the first day on which the mortgagee shall be able by law to take proceedings by action or otherwise for the recovery of the same, and the interest thereon shall commence to accrue from that day"; and the mortgagor, in consideration of the premises and as beneficial owner, charged the property specified in the schedule thereto, with the payment to the mortgagee of all moneys and interest secured by the covenant of the mortgagor thereinbefore contained.

The fourth occasion on which the account was balanced was on August 29, 1905, when, after bringing forward the 3818*l.* 14*s.* 1*d.* and debiting 2403*l.* 14*s.* 7*d.* for costs from December 14, 1904, to June 30, 1905, there remained a balance of 6326*l.* 15*s.* 10*d.* due to Mr. Chatterton. On each of the four occasions on which the account was balanced the debtor wrote at the foot of the account "I agree this account," and added his signature and the date. Also on each of these occasions, and before the account was signed, Mr. Chatterton produced to the debtor his draft bill of costs, and the debtor went through it and agreed it at the figure it was entered in the account, and asked Mr. Chatterton not to bother him with a detailed bill of costs.

On March 12, 1906, a receiving order was made against the debtor, adjudication followed, and a Mr. Pattullo became the trustee.

On April 24 Mr. Chatterton lodged a proof against estate for 7352*l.* 11*s.* 4*d.*, being as to 6326*l.* 15*s.* 10*d.* principal, and as to 225*l.* 15*s.* 6*d.* interest, due under the covenant in the mortgage of January 10, 1905, and as to the said sum of 6326*l.* 15*s.* 10*d.*

1906

VAN LAUN, *In re.* PATTULLO, *Ex parte.*

upon an account stated, and as to 800*l.* for fees and professional work as solicitor for the debtor from June 30, 1905, to January 4, 1906, and he valued his said security at 4000*l.*

On July 10 the trustee required Mr. Chatterton to furnish further particulars under his proof, namely, as to the sum of 6326*l.* 15*s.* 10*d.* upon an account stated, to produce vouchers for the various payments alleged in the said stated accounts to have been made between March 16, 1901, and June 30, 1905, and to supply details, with date and items, of the amount agreed for costs and included in the stated account on each of the four occasions on which the account was balanced as mentioned above. Mr. Chatterton declined to furnish these particulars, on the ground that the stated account could not be reopened. Thereupon the trustee rejected the whole of the proof, and against this rejection Mr. Chatterton now appealed.

It was agreed that Mr. Chatterton's costs were for the greater part in respect of contentious business, and that, as to the 800*l.*, a detailed bill of costs, with items, must be delivered to the trustee.

J. A. Hamilton, K.C., and *G. A. Scott*, for Mr. Chatterton. It is too late now for the debtor to set up that he did not know what he was doing and to claim to go behind the settled accounts and the covenant in the mortgage, and the trustee is in no better position. Chatterton, therefore, is entitled to prove on the settled accounts and the covenant in the mortgage, and is not bound to render detailed bills of costs for taxation. Even if the accounts could be reopened after twelve months, the debtor must prove fraud, or duress, or something of that kind, but nothing of the sort is suggested here. If the words "payment of any such bill" in s. 41 of the Act of 1843 mean delivery of a signed bill, there is no magic in the word "delivery," and a client may dispense with the delivery of a signed bill, and when paid the bill cannot after twelve months be reopened: *In re Sutton and Elliott* (1); *In re West, King and Adams* (2); *In re Chapman.* (3) The giving of the mortgage for the agreed balance due for costs

(1) (1883) 11 Q. B. D. 377, 379. (2) [1892] 2 Q. B. 102.
(3) (1903) 20 Times L. R. 3.

with a covenant to pay was equivalent to payment of the bills within s. 41 of the Act: *Ex parte Turner.* (1)

[BIGHAM J. I do not think the Court in that case intended to decide that the giving of a mortgage was equivalent to payment of the bill of costs. I do not think it is. In that case the mortgage was afterwards transferred, and in that way the solicitor did obtain payment of his bill.]

Here the draft bills were on each occasion delivered to the debtor and discussed with him, the amount due for costs was agreed upon and entered to his debit in the cash account before the balance was struck; and the debtor requested Chatterton not to trouble him with a detailed bill of costs. The debtor, therefore, having dispensed with delivery of a signed bill and having given a mortgage, cannot, after twelve months, reopen the accounts. The trustee, in consequence, is not entitled to ask for particulars of the settled accounts with vouchers.

Hansell, for the trustee. It cannot be admitted that the trustee is in the same position as the debtor, first, because this is a proof for costs, and the trustee has to determine whether it is to be admitted or not; and, secondly, because the trustee represents the general body of creditors. He is entitled under r. 22 of Sched. II. of the Bankruptcy Act to require the further particulars for which he has asked.

[BIGHAM J. Is the trustee entitled to go behind the settled accounts and the covenant in the mortgage?]

Yes. The bankruptcy Court can go behind a judgment and inquire into the consideration for the judgment debt: *Ex parte Kibble* (2); *Ex parte Lennox.* (3) The same principle applies to a mortgage, and to an account stated, and entitles the trustee to go behind them and ascertain the real facts. Further, the three signed cash accounts prior to the mortgage, which included on each occasion the agreed sum for costs, are really agreements within s. 4 of the Solicitors Act, 1870, and these agreed costs are put into the mortgage, but under the proviso in s. 4 the solicitor cannot retain any money, or be paid or sue for the agreed sum, until the agreement has been examined and

(1) 24 L. J. (Ch.) 71; S. C. sub. nom. *In re Boyle*, 5 D. M. & G. 540.

(2) (1875) L. R. 10 Ch. 373.

(3) (1885) 16 Q. B. D. 315.

1906

VAN LAUN, *In re.* PATTULLO, *Ex parte.*

allowed by a taxing officer: *In re Baylis* (1); and it is impossible to decide whether an agreement is fair or reasonable without taxing the bill: *In re Frape.* (2) The same principle applies when the solicitor seeks to prove for the amount of the agreed bill; he cannot do so until the taxing officer has allowed it, and the taxing officer cannot certify until the bill has been delivered and considered.

[*G. A. Scott.* The solicitor is not relying on any agreement under the Act of 1870.]

If the solicitor did in fact make these agreements as to costs under s. 4 of the Act of 1870 he cannot resile from them, but is bound by the proviso in the section. The cases cited on the other side do not apply. There is no case in which it has been held that where the client says "Don't trouble to deliver a bill," or waives delivery, that that is equivalent to delivery of the bill. It may be conceded that the mortgage is a good security for the sum actually due. Here the solicitor claims to enforce payment under the covenant in the mortgage for the agreed sums for costs. That drives one to the Act of 1870, and the trustee is entitled to go behind the mortgage and to investigate and ascertain the actual indebtedness, and there is no limit of time.

J. A. Hamilton, K.C., in reply. The solicitor in this case could do no more than he has done in delivering a bill of costs. Both in *Ex parte Kibble* (3) and *Ex parte Lennox* (4) the judgment of the Court was based on suspicious circumstances, but nothing of the kind is shewn here. Under the circumstances the settled and signed cash accounts constitute payment, and there is no authority for the proposition that merely because the trustee does not know the details of the items in the accounts stated he can, after twelve months, investigate the anterior transactions which resulted in the mortgage debt. Neither in *In re Frape* (2) nor in *In re Baylis* (1) was there any semblance of delivery of a detailed bill. Here everything in the way of delivery of the bill of costs, except an engrossed signed copy, was put into the hands of the client. Suppose that there was an agreement under s. 4

(1) [1896] 2 Ch. 107, 111.
(2) [1893] 2 Ch. 284, 296.
(3) L. R. 10 Ch. 373.
(4) 16 Q. B. D. 315.

of the Act of 1870, then s. 10 of that Act, which is analogous to s. 41 of the Act of 1843, shews that where payment has been made the Court will only reopen the matter within twelve months under special circumstances, but no special circumstances exist here.

Cur. adv. vult.

Nov. 27. BIGHAM J. In this case the bankrupt had employed Mr. Chatterton as his solicitor in contentious business. The employment extended over several years, and very large costs were incurred. From time to time Mr. Chatterton prepared draft bills of these costs and tendered them to the bankrupt for examination. The bankrupt, however, declined to be troubled with them; perhaps because he had other matters to attend to, or possibly because his confidence in Mr. Chatterton was such that he thought it needless to check the bills. In these circumstances Mr. Chatterton on March 30, 1903, prepared a cash account shewing a balance due to him by the bankrupt of 1354*l.* The last item on the debit side was as follows: "My costs up to November 15, 1902, as agreed, 6600*l.*," and the bankrupt wrote at the bottom of the paper the words "I agree this account" and signed it. A similar account was prepared on July 24, 1903, in which there was an item of 1801*l.* 7*s.* 1*d.* for costs. This account the bankrupt agreed and signed in a like manner, and in fact gave a bill at three months for the balance, namely, 443*l.* 0*s.* 9*d.*, which was subsequently dishonoured. On January 5, 1905, a third account was prepared, the last item of which was as follows: "My costs from June 24, 1903, to December 14, 1904, 2932*l.* 1*s.* 5*d.*" For some reason this sum was reduced to 2900*l.*, and the account was then signed by the bankrupt, with these words, "Costs agreed at 2900*l.*; balance due, 3818*l.* 14*s.* 1*d.*" On January 10, 1905, the bankrupt executed a deed in favour of Chatterton which, after reciting the indebtedness of 3818*l.* 14*s.* 1*d.*, contained the bankrupt's covenant to pay the amount on demand, and also to pay future costs as they might fall due. The deed also purported to assign to Mr. Chatterton by way of security a number of choses in action which are scheduled to the deed, and which are said to comprise the

1906

VAN LAUN, *In re.* PATTULLO, *Ex parte.*

Bigham J.

whole or the greater part of the bankrupt's estate. Other accounts followed, but it is not material to deal with them except to say that the final account was dated August 29, 1905, and shewed a debit balance of 6326*l.* 15*s.* 10*d.* This account also contained an item for costs, the amount being 2403*l.* 14*s.* 7*d.*, and, like the others, it was signed by the bankrupt with the words "I agree the account." In every case a draft bill of costs was tendered to the bankrupt and considered by him. Mr. Chatterton lodged a proof with the trustee for 7352*l.* 11*s.* 4*d.*, made up of the 6,326*l.* 15*s.* 10*d.* as principal and 225*l.* 15*s.* 6*d.* for interest, and 800*l.* for fees and charges from August 29, 1905, to the date of the receiving order. The proof as to the 6326*l.* 15*s.* 10*d.* was founded on the covenant in the deed and, in the alternative, on accounts stated. On August 8, 1906, the trustee rejected the proof, upon the ground that Mr. Chatterton had refused (as was the fact) to supply dates and items of the agreed sums for costs mentioned in the accounts stated. From this rejection Mr. Chatterton has appealed, and I have to determine whether in the circumstances Mr. Chatterton is bound to furnish such particulars. Mr. Chatterton contends that the time is gone by for taxation of his bills, and that the trustee is entitled to see no more than the accounts agreed by the bankrupt which contain the lump sums already mentioned. If I had merely to ascertain the rights as between Mr. Van Laun and Mr. Chatterton I should probably be of opinion that the time for taxing the costs had gone by. I think the requirement of the Solicitors Act, 1843, as to the delivery of a signed bill is one which the client may waive, and that in this case it was waived, and I think also that the carrying of the items for costs into the cash accounts and the subsequent statement of the account between the parties may be regarded as equivalent to payment of the costs. If this is so, Mr. Van Laun would be deprived of the right to require delivery of a detailed bill for the purpose of taxation; and upon the evidence as it stands I can discover no special circumstances which would revive the right. But I am not dealing with the rights between Mr. Van Laun and Mr. Chatterton. I am dealing with the rights between Mr. Chatterton and the general body of creditors as represented by the trustee. The trustee's right and

duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he will think them fair and reasonable and, if so, he will probably admit the proof. But until Mr. Chatterton furnishes him with the means of forming an opinion I think the trustee cannot do otherwise than reject the proof. I understand that no question arises as to the costs (about 800*l.*) incurred since the date of the deed. These will be taxed in the ordinary way. The appeal must be dismissed with costs.

Solicitors: *Chatterton & Son; Spyer & Sons.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1906
Nov. 29.

ATTORNEY-GENERAL *v.* GLOSSOP AND OTHERS.

Revenue—Estate Duty—Property passing on Death—Settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 3—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 14; *s.* 15, *sub-s.* 1.

Not Followed. In re LAMBTON'S MARRIAGE SETTLEMENT [1952] 1 Ch. 752

An "interest is created" within the meaning of the words "and no other interest is created by the said disposition" in the Finance Act, 1896, s. 15, sub-s. 1, by a limitation in a marriage settlement in favour of unborn children of the marriage, although there never is a child of the marriage.

By a marriage settlement property, described as the husband's fortune and the wife's fortune respectively, was settled by the husband and wife upon trust (inter alia) to pay during the joint lives of husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation and to pay the residue of the income, and after the death of the wife the whole income, to the husband for life, and after his death to pay the whole income to the wife for life, and upon trust after

C. A.
1906

ATTORNEY-GENERAL
v.
GLOSSOP.

the death of the survivor for such children of the marriage as the husband and wife, or the survivor, should appoint, and, in default of appointment, upon trust for the children of the marriage who should attain the age of twenty-one, or being daughters should marry under that age, and, failing such issue, upon trust as to the husband's fortune for him, his executors, administrators and assigns, and as to the wife's fortune for her executors, administrators and assigns. There was no issue of the marriage, and the wife survived the husband:—

Held (affirming the judgment of Walton J.), that upon the death of the husband estate duty became payable upon the wife's fortune, except as to so much of it as formed part of the corpus which produced the annuity of 400*l.*; but that as to this latter amount no estate duty was payable by reason of the provisions of the Finance Act, 1894, s. 5, sub-s. 3.

Attorney-General v. *Wood*, [1897] 2 Q. B. 102, followed.

APPEAL by the defendants, and cross-appeal by the Attorney-General, from the judgment of Walton J. (1) upon an information claiming estate duty.

The defendants were the trustees of the marriage settlement, dated November 18, 1873, of Samuel Francis Glossop Bythesea and Mary Prideaux Mitchell. By the indenture of settlement it was recited that certain hereditaments, the property of the said S. F. G. Bythesea, and referred to as "the husband's fortune," had become vested in the trustees upon trust for sale and to stand possessed of the sale moneys upon the trusts of the marriage settlement; that certain hereditaments, the property of the said Mary Prideaux Mitchell, had become vested in the trustees subject to the life estate of her mother upon trust for sale after the marriage and to stand possessed of the sale moneys upon the trusts of the marriage settlement; that certain sums of money, securities, and stock, the property of Mary Prideaux Mitchell, had become vested in or had been transferred to the trustees; and that Mary Prideaux Mitchell was entitled to certain other securities and property, subject as to certain parts thereof to her mother's life interest; all the property to which Mary Prideaux Mitchell was entitled being described as "the wife's fortune." It was then declared and agreed that the trustees should after the marriage stand possessed both of the husband's fortune and the wife's fortune upon trust to invest the same and

(1) [1906] 1 K. B. 284.

out of the income arising therefrom to pay during the joint lives of the husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation, and subject thereto to pay the residue of the income, and after the decease of the wife to pay the whole thereof, to the husband during his life, and after his decease to pay the whole income to the wife for life; and after the decease of the survivor upon trust for such of the children of the marriage as the husband and wife, or the survivor, should appoint, and, in default of appointment, upon trust for the children of the marriage who should attain the age of twenty-one, or being daughters should marry before that age, and, if more than one, in equal shares as tenants in common; and on failure of such issue the trustees were to stand possessed of the husband's fortune in trust for the husband, his executors, administrators and assigns, and of the wife's fortune upon trust, if she were the survivor, for her executors, administrators and assigns, but if she should die in the lifetime of her husband in trust for such person as she should by will appoint, and in default of appointment for the persons who at the time of the failure of the trusts would be entitled under the Statutes of Distribution in case she had died intestate and without having been married.

There was no issue of the marriage. On May 3, 1904, the husband died, and his will was duly proved. Estate duty was paid upon the value of the property settled by him, and referred to as the husband's fortune, but not upon any part of the property in the settlement referred to as the wife's fortune.

The Crown claimed that under these circumstances estate duty under the provisions of the Finance Act, 1894, became payable on the death of the husband in respect of the principal value of the property settled by the wife and referred to as the wife's fortune, with the exception of a small part in which there was an existing life interest, and an account was prayed to ascertain the amount of estate duty and interest thereon payable in respect of the said property.

By their answer the defendants contended that estate duty did not become payable on the death of the husband in respect of the principal value of any part of the wife's fortune.

Walton J. held that estate duty was payable upon the wife's

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

fortune except as to so much of it as formed part of the corpus which produced the annuity of 400*l.*

Danckwerts, K.C., and *Austen-Cartmell*, for the defendants. As regards the question raised in the appeal, the case comes within the exemption created by the Finance Act, 1896, s. 15, sub-s. 1. (1) It has been held that the Finance Acts, which apply not only to England and Ireland, but also to Scotland, where a different system of real property law and conveyancing prevails, are to be construed, not by reference to the technicalities of conveyancing law, but in accordance with the substance of things, and the meaning which an intelligent person, not a lawyer, would put upon the language used. In the Court below the case of *Attorney-General* v. *Penrhyn* (2) was to some extent an authority against the defendants, but that case is not binding on this Court. The first question is what is meant by a "disposition of property" and the "said property" in s. 15, sub-s. 1. There may be several dispositions of property in one settlement or instrument, which may respectively affect different properties or different parts of the same property. The expression "property" as used in the sub-section means the subject-matter of the "interest." Thus there was in the settlement in the present case first of all a disposition of such amount of the "wife's fortune" as formed part of the corpus necessary to produce the annuity of 400*l.* for the wife. That disposition may be put aside for the purposes of the appeal. Then there was another disposition of property, namely, of the rest of the "wife's fortune," and with respect to this all the conditions

(1) By the Finance Act, 1896, s. 15, sub-s. 1: "Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime."

(2) (1900) 83 L. T. 103.

of the sub-section are satisfied. In the Irish case of *In re Cochrane* (1) it was held upon the language of the Acts relating to the account duty that, where by a disposition part of a property was "given," and part was not, it could not be said that there was any retention out of the "gift." This clearly shews that, for the purposes of the sub-section, the disposition of that part of the wife's fortune which formed part of the corpus necessary to produce the annuity must be looked at apart from the subsequent disposition of the remainder of the wife's fortune. If this be so, it will be seen that in respect of this latter disposition all the conditions of the sub-section were fulfilled. First, the husband entered into possession of the interest, and thenceforward retained it to the entire exclusion of the disponer, or of any benefit to her by contract or otherwise; secondly, the only benefit which the disponer retained in the said property was subject to the life interest of the husband; and, thirdly, no other interest was created by the said disposition, for there were no children of the marriage, and therefore no interest ever became vested under the limitation in favour of children. The notion of a "contingent interest" is no doubt familiar among the technicalities of conveyancing law, but, as already mentioned, the Finance Acts are not to be construed with reference to these; and it seems impossible to say, in the ordinary use of language, that an interest is created when there is not, and never has been, any person in whom the interest could exist. Possibly, if a child of the marriage had been born, who survived the father, and died before attaining twenty-one, or, if a daughter, marrying, it could not then have been said that no other interest was created by the disposition, but that is not the present case.

It is quite possible, on the construction of the sub-section for which the defendants contend, to give a meaning to the words "and the only benefit which the disponer retains in the said property is subject to such life or determinable interest," for in a settlement an overriding power might be reserved to the settlor to revoke the existing limitations or to create interests in priority to them. (2)

(1) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

(2) In reference to the point taken on s. 21, sub-s. 5, of the Finance Act,

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Sir J. Lawson Walton, A.-G., and *Vaughan Hawkins* (*Sir R. B. Finlay, K.C.*, with them), for the Crown. As regards the appeal, it is fairly clear from the language of the Finance Act, 1896, s. 15, sub-s. 1, to what sort of disposition it was intended to apply. It is admitted that estate duty would be payable in respect of the property here in question under s. 1 and s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, if the case did not come within s. 15, sub-s. 1, of the Act of 1896. The object of that sub-section is to confer an exemption from estate duty in a case in which the owner of property in his lifetime makes a disposition by which some life interest is charged on, or created in, that property in favour of a person other than the disponer, and nothing more is done—as when a master charges a life annuity on property, or creates some life interest in it, in favour of a faithful servant. It was thought hard in such a case that the disponer should have to pay estate duty when the property reverted to him on the death of the person in whose favour the disposition was made. The conditions with regard to the retention of an interest by the disponer were inserted to confine the provisions of the sub-section to the sort of case contemplated, and to prevent advantage being taken of it to make what would be really testamentary dispositions so as to avoid estate duty: *Earl Grey* v. *Attorney-General*. (1) The sub-section was not intended to apply to a settlement in the usual sense of the term, such as a marriage settlement like that in this case, by which a life interest is created in the settlor with subsequent interests in remainder and an ultimate remainder to the settlor. The construction of the words "disposition of property" in the sub-section suggested for the defendants is inadmissible. The word "property" means the whole of the property which by the disposition is made subject to the "interest." It cannot mean the interest conferred. No separate portion of the "wife's fortune" was in this case made part of the corpus from which the annuity was produced. It was

1894, in the Court below, and there held to be concluded by *Attorney-General* v. *Strange*, [1898] 2 Q. B. 39, counsel for the defendants stated that they did not abandon the point, in view of the possibility of the case going beyond the Court of Appeal.

(1) [1900] A. C. 124.

payable out of the income of the whole fund. That being so, it is impossible to say that the husband entered into possession to the entire exclusion of the disponer, or of any benefit to her by contract or otherwise, or that the only benefit which the disponer retained in the property was subject to the life interest created in the husband, for she retained a prior interest to the extent of 400*l*. Again, the limitation in favour of children of the marriage clearly created another interest within the meaning of s. 15, sub-s. 1. The Irish case *In re Cochrane* (1) turned on the words of the Acts relating to account duty, which are different from those of the Finance Acts. In that case the question was as to the true effect of the disposition, whether it was a gift of the whole of a property, subject to a reservation of an interest out of it, or a gift of a separate part only of the property, the rest not being given. The decision has really no bearing on the present case owing to the difference of the phraseology of the two sets of enactments involved. The condition of immunity imposed by the words "and no other interest is created by the said disposition" shews that it was intended to exclude the case of a settlement containing a series of limitations like that in question.

With regard to the cross-appeal—namely, as to so much of the wife's fortune as may be deemed to have constituted part of the corpus necessary to produce the annuity of 400*l*.—it is submitted that the case does not fall within the exemption given by s. 5, sub-s. 3 (2), of the Finance Act, 1894. In the first place, there was no failure of an interest given to the husband. The substance of the transaction was that by the disposition of the property contained in the settlement the husband was given a life interest in the fund subject to a charge of the payment of the annuity to the wife during their joint lives. Secondly, there was no limitation which continued to subsist after the death of the husband within the meaning of the sub-section.

(1) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

(2) By the Finance Act, 1894, s. 5, sub-s. 3: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

On his death the absolute limitation to the wife eo instanti took effect, and became exhausted, and therefore cannot be said to have continued to subsist. The phrase "continue to subsist" points to some limitation which continues to operate over a period of time until it determines and other limitations come into play, such as that of a life estate in land. [They also cited *In re De Hoghton* (1); *Attorney-General* v. *Beech* (2); *Earl Cowley* v. *Inland Revenue Commissioners.* (3)]

Danckwerts, K.C., for the defendants, in reply. There clearly was a failure of the husband's interest as regards the portion of the wife's fortune involved in the cross-appeal. It is impossible to regard him as ever having been in possession of the income of that portion. Secondly, there was a subsequent limitation which continued to subsist in favour of the wife when he died. The point of time which must be looked at in determining the question whether there was a limitation which continued to subsist for the purposes of the Finance Act, 1894, s. 5, sub-s. 3, is the moment of the husband's death: see *Attorney-General* v. *Wood.* (4)

COLLINS M.R. This is an appeal from the decision of Walton J., which was in favour of the Crown as to a large portion of the property involved, and there is a cross-appeal as to the residue of the property in respect of which the decision was against the Crown.

The question arises on a marriage settlement by which a mixed trust fund was created, composed partly of the husband's property, called in the settlement "the husband's fortune," and partly of the wife's property, called in the settlement the "wife's fortune," and certain limitations were made with respect to that fund. The limitations of the settlement were as follows. [The Master of the Rolls here read the limitations as stated above.] No question arises in this case as to the portion of the fund constituted by the "husband's fortune," the estate duty having been paid on that. The question arises only with regard to the part of the fund constituted by the "wife's fortune."

(1) [1896] 1 Ch. 855.
(2) [1899] A. C. 53.
(3) [1899] A. C. 198.
(4) [1897] 2 Q. B. 102.

I will deal first with the appeal. Mr. Danckwerts contends that the exemption conferred by the Finance Act, 1896, s. 15, sub-s. 1, applies, and exempts from estate duty so much of the wife's property brought into settlement as is covered by the words "disposition of property," as construed by him, in that sub-section. The sub-section is as follows: "Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this part of this Act, the property shall not be deemed for the purpose of the principal Act to pass by reason only of its reverter to the disponer in his lifetime." Addressing himself to the terms of the settlement in this case, the defendants' counsel began by putting aside from the discussion the provision whereby an annuity of 400*l.* a year was created in favour of the wife. He said that, putting that aside, there is a "disposition of property"—i.e., of the residue of the wife's fortune, or that part of it which stands outside the provision as to the annuity—within the meaning of the sub-section, and that the term "disposition of property" is none the less applicable to that because there is another disposition of other property in the same settlement, which is not the subject of the particular gift in respect of which he raises his contention. He said that, as regards the part of the property which stood apart from and outside of all that which was applied for the purposes of the annuity, the case comes within the exemption given by the sub-section, because the disponer made a disposition of it by which an interest was conferred on another person, i.e., the husband, for his life, and such person entered into possession of the interest, and thenceforward retained possession thereof, to the entire exclusion of the disponer, or of any benefit to her by contract or otherwise, and the only benefit which she, the disponer, retained was subject to such life interest; and further, he said—a point which may cause

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Collins M.R.

him some difficulty, even if he is right on other points—that no other interest was created by the said disposition. Therefore, he said, all the conditions required by the sub-section were fulfilled. In support of his main contention counsel referred to an Irish case, *In re Cochrane* (1), in which a number of very eminent judges in Ireland took part and a very interesting discussion occurred. In my view it is not necessary for the purposes of the present case to pronounce any opinion as to whether the decision in that case was right or not. I should be sorry to hazard a suggestion that the decision of such eminent judges, supported as it was by such admirable arguments, was not right; but it may be observed that the words on which it turned are not the same as those which we are considering, inasmuch as it turned on the language of an earlier Act, which has been superseded by the Finance Act, 1894; and I do not feel called upon to consider whether that decision was correct, because I think that the case for the defendants breaks down upon one of the conditions of immunity mentioned in s. 15, sub-s. 1, namely, that which requires that no other interest shall be created by the disposition. It was strenuously argued by the defendants' counsel that we ought not to deal with the construction of the Finance Acts in a strict technical manner, but that, clearing our heads of the technicalities of conveyancing and the terms of art used by conveyancers, we should approach the matters involved from the point of view, I will not say of the man in the street but, of an ordinary well-educated English gentleman not a lawyer. I do not think, however, that that suggestion must be carried too far; for, after all, the Acts have been framed by draftsmen acquainted with conveyancing terms, and they must in the nature of things be addressed to a large extent to a section of the public familiar with those terms; and I do not think that it would be right or possible, in dealing with the provisions of the Finance Acts, to ignore altogether the technicalities of conveyancing, and to disengage one's mind entirely from all acquaintance with the technical terms which conveyancers use, and in which likewise to some extent the draftsmen of Acts of Parliament couch the

(1) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

provisions which they frame. With these preliminary observations I come to those words of the sub-section which seem to me decisive of this case. They are, "and no other interest is created by the said disposition." It was argued for the Crown that there was another interest created by this disposition, namely, the interest given to children of the marriage. It was contended, however, for the defendants that, as no such children ever came into existence, and no interest therefore ever in fact vested in any children, another interest was not created within the meaning of the sub-section. It seems to me that to give effect to that contention would be to ignore the fact that our law does recognize and deal with contingent interests; and, unless we can say that such an interest cannot be embraced by the term "interest created" as used in the sub-section, the contention for the defendants must fail. Contingent interests such as these have been treated not only in the phraseology of conveyancers, but also in Acts of Parliament, as the subject-matter of legal contemplation; and the law has in the past provided for the protection of such interests by means of trustees appointed for the purpose of preserving the interests of persons unborn, but who, if born, would become entitled to them. It does not seem to me to be the right way of dealing with a provision of this kind, to ascertain the legal position by reference to the events that subsequently happened, and to say that no interest was created by the disposition because, by reason of those events, the disposition did not take effect as regards those interests. I think we must look at the state of things as contemplated at the time when the disposition was made by the parties to it, who intended to create those interests in persons yet unborn, which would become theirs, if they were born, and which the law would assist in providing for when they came into existence, and would safeguard in the meantime. It seems to me, therefore, that one of the conditions of immunity mentioned in the sub-section is not fulfilled, and that there was another interest created by the disposition. That suffices to dispose of the appeal; and, without expressing any opinion as to whether the defendants' counsel was right in his fundamental proposition—namely, that the disposition of the residue of the wife's fortune could be treated as a "disposition of

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Collins M.R.

property" within the meaning of the sub-section apart from the other disposition dealing with the creation of the annuity—I think that the judgment of Walton J. so far was correct, and must be affirmed.

I come now to the cross-appeal in respect of that portion of the wife's fortune which Walton J. held not to be subject to estate duty. The learned judge has decided that "the Crown is entitled to succeed except as to so much of the 'wife's fortune' as is her share of the capitalized value of the fund which produced the income of 400*l.* a year." This part of the case turns on other considerations. The question is whether the case comes within s. 5, sub-s. 3, of the Finance Act, 1894, which is as follows: "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death." The learned judge said, "as to so much of the corpus producing the 400*l.* a year as was part of the wife's fortune the case is different. If he had survived his wife, he would have been entitled to a life interest in this, and this interest failed on his death before it became an interest in possession. The question remains whether as to this any subsequent limitations continued to subsist after the death of the husband. I have already held in effect that upon the death of the husband the wife became entitled to this property absolutely. But it appears to me that, if this be so, it has been decided in *Attorney-General* v. *Wood* (1) that in such a case a limitation under the settlement does continue to subsist within the meaning of s. 5, sub-s. 3. In my judgment, therefore, so much of the wife's fortune as formed part of the capital which produced the income of 400*l.* a year must not be deemed to have passed on the husband's death." In my opinion it is clear that there was an interest of the husband in this part of the wife's fortune which failed or determined by reason of his death before it became an interest in possession. The question is whether, when the husband's interest failed, the subsequent limitation in favour of the wife could be said to continue to subsist. It seems to me

(1) [1897] 2 Q. B. 102.

that, when it had to be admitted, as it was, that on the death of the husband the wife took by virtue of that limitation, it followed that the limitation must be held to have continued to subsist within the meaning of the sub-section. That was the decision of Vaughan Williams and Wright JJ. in *Attorney-General* v. *Wood*. (1) If the words of the sub-section, fairly read, are applicable, I do not think we ought to endeavour to defeat an immunity which is prima facie given by the Act. The section gives an exemption where an interest fails or determines by reason of death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist. Such a limitation subsists when it is effective. In this case the limitation was effective, inasmuch as the wife took by virtue of it. The result is that, as the subsequent limitation to the wife continued to subsist, s. 5, sub-s. 3, applied. The cross-appeal therefore fails. The judgment of the learned judge will be affirmed upon both points.

COZENS-HARDY L.J. I agree that the appeal against that portion of the learned judge's judgment which was in favour of the Crown fails. The question seems to me really to turn on the true construction of s. 15, sub-s. 1, of the Finance Act, 1896. If it had been necessary for the determination of this case to form a conclusive opinion on the meaning and effect of the first and second of the three conditions of immunity contained in the sub-section, I should, for myself, have desired to take time for consideration. As at present advised, I doubt whether there is anything in the decision of the Irish judges in the case of *In re Cochrane* (2) that is an authority for the proposition that in the present case, for the purpose of the application of s. 15, sub-s. 1, the provision of the settlement by which the annuity of 400*l.* in favour of the wife is created must be regarded as a separate disposition of property; and I am not clear that in this case the terms of the first two conditions of immunity in the sub-section are satisfied. It is sufficient here to say that the case is not within the sub-section, because there is another interest created by the said disposition. It was argued for some time

(1) [1897] 2 Q. B. 102. (2) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Cozens-Hardy L.J.

by counsel for the defendants that no contingent interest could be another "interest created" within the meaning of the sub-section; but he ultimately felt obliged to assent to the view that, if there had been in this case an infant child of the marriage who survived his father and died at the age of twelve months, the benefit of the section could not have been claimed; but in that case the infant would never have had anything but a contingent interest, because under the settlement his interest was not to become vested until the age of twenty-one. The root fallacy in the argument of the learned counsel appears to me to be that, for the purpose of seeing whether another interest is created, he seeks to look, not at the period of time when the disposition is executed, but at a later period, in order to see what the result of it was in the events which happened. I do not think that is the correct mode of dealing with the case. It was suggested that the interest of an unborn person is something so intangible that an ordinary person, not a lawyer, would not recognize it as being an "interest" in the sense in which that term is used in the sub-section. I cannot see any reason in point of principle or any authority why the term "interest" should be construed so as to exclude a contingent interest. Such interests are well known to the law, and it was part of the usual legal machinery of a settlement of land to appoint trustees for the purpose of preserving contingent remainders; and in s. 27 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), we find an enactment which recognizes the existence of the interests of unborn children and deals with them. That section provides that "Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land." In the face of that section it seems to me impossible to say that the interests limited in this settlement, as in most marriage settlements, in favour of unborn children of the marriage are not

interests created by the disposition within the meaning of s. 15, sub-s. 1. For these reasons I think that Walton J. was right with regard to that part of the case.

With reference to the cross-appeal, I confess that I have felt more difficulty, but I am not prepared to differ from the other members of the Court. I think that s. 14 of the Finance Act, 1896, clearly cannot avail the defendants, because here the property was not settled by the lady on herself for life, but for the joint lives of herself and the husband; but, as regards s. 5, sub-s. 3, of the Finance Act, 1894, I feel that the question is one of more difficulty, and I am not, as I have said, prepared to dissent from the view taken by Vaughan Williams and Wright JJ. in *Attorney-General* v. *Wood* (1) and by my colleagues in the present case, to the effect that one must look at the moment of time when the husband died to see whether there was any subsequent limitation subsisting, and, if at that moment there was any such limitation subsisting, then the property is not to be deemed to pass on the death of the husband. If that view is correct, it disposes of the case. I desire, however, to say that I am not prepared, as at present advised, to agree with what Vaughan Williams J. said in the case of *Attorney-General* v. *Wood* (2), to the effect that such a limitation not only continued to subsist at the moment of the husband's death, but would continue to subsist till the death of the wife.

FARWELL L.J. I agree. With regard to the first point, it is material to consider ss. 14 and 15 of the Finance Act, 1896, together, and compare their phraseology. They are both exemption sections. Sect. 14 deals with settlements in the ordinary sense, by which a person settles property on himself for life with remainders over, and an ultimate limitation to himself, after failure of intervening limitations. Sect. 15, sub-s. 1, is, I think, intended to provide for cases where there is a disposition, the effect of which is to create an annual charge or annuity for life, or some other interest for life or determinable on death, in a person other than the disponer, and nothing more. I do not think that the decision

(1) [1897] 2 Q. B. 102. (2) [1897] 2 Q. B. 102, 109.

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Farwell L.J.

in the Irish case *In re Cochrane* (1) has any bearing on the present case, owing to the difference in the phraseology of the enactments involved in the two cases respectively. The Irish case dealt with the construction of the Acts relating to account duty and the meaning of the word "gift" in those Acts. The words of s. 15, sub-s. 1, of the Finance Act, 1896, shew that the Legislature was distinguishing between the property which is the subject-matter of the disposition on the one hand and the interest created in that property by that disposition on the other. The sub-section applies to cases "where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession"—not of the property, but—"of the interest, and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise"—i.e., out of the interest—"and the only benefit which the disponer retains in the said property"—not the said interest—"is subject to such life or determinable interest, and no other interest is created by the said disposition." The language of the sub-section points to cases where by a disposition in favour of a person other than the disponer a rent-charge for life is charged on property of the disponer, or where some life interest in such property is created, and the sole limitation by way of remainder is to the disponer, or there is a reverter to him without limitation; in these cases the rent-charge for life or the life estate is the "interest," and the property on which it is charged, or out of which it is created, is the "property" disponed within the meaning of the section. If my view of the construction is correct, then it is clear that the case cannot fall within the section, because here the disponer retained to herself out of the property a prior interest to the extent of 400*l.* per annum for the joint lives of herself and her husband, and therefore t cannot be said that the only benefit which she retained in the said property was subject to the life interest of the husband.

Again, the words of the sub-section require that no other interest shall be created by the said disposition. In this case

(1) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

there was a limitation, after the death of the husband and wife, in favour of the children of the marriage on attaining twenty-one, or, in the case of daughters, marriage, and, failing children, there were remainders over as to the wife's fund to her, if she survived the husband, absolutely, and if she died in his lifetime to her testamentary appointees or statutory next of kin, and as to the husband's fund to him absolutely. There are therefore other interests created by the disposition within the meaning of the sub-section. I have listened to the argument of the defendants' counsel with some surprise, for I cannot understand by what a contingent interest can be said to be created, unless it is by the disposition in which it is inserted. The defendants' counsel suggested that a contingent interest in an unborn child could not properly be said to exist in law. But in *Garth* v. *Cotton* (1), where lands were limited to A. for ninety-nine years, if he should so long live, with remainder to trustees during his life to preserve contingent remainders, with remainder to his first and other sons in tail, I find Lord Hardwicke saying: "Further, it was the duty of the plaintiff's father so to have done"—i.e., to have brought an action of trespass—"not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainderman, when he should come in esse: for between the tenant for years and the lessor, or the remainderman of the inheritance, there is a privity: and, before the statute of Quia Emptores Terrarum, a tenure arose, and this makes a tenant for years a kind of fiduciary for the lessor, or the remainderman, who stands in his place." So that from early times the interest of an unborn contingent remainderman has been looked upon by the law as a real interest, and, apart from any question of technicality, the trustees to preserve contingent remainders were created for the purpose of protecting those very interests which, according to the argument of the defendants' counsel, have not been, and cannot be, created. Therefore it seems to me that the decision of Walton J. on the first question was perfectly right.

(1) (1753) 1 Dick. 183, p. 189.

C. A. 1906

ATTORNEY-GENERAL v. GLOSSOP.

Farwell L.J.

Then, with regard to the second question, I also think that the learned judge was right. That question turns on s. 5, sub-s. 3, of the Finance Act, 1894, which provides that, "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death." In this case there was in the first place a trust, during the joint lives of the husband and wife, to pay out of the entire income an annuity of 400*l.* to the wife and to pay the residue of the income to the husband, and, then, after the death of either of them, there was a trust to pay the whole income to the survivor. It seems to me clear that the husband failed to take any interest in possession in such part of the wife's fortune as is property attributable to the production of the 400*l.* annuity. To my mind it is a perversion of language to say that, in the events that happened, the husband ever had an interest in possession in the whole income, subject only to a charge of 400*l.* He never had anything but a right to receive the residue remaining after payment of the annuity of 400*l.* to the wife; and the trustees would have been guilty of a breach of trust if they had let him into possession of the whole income on his undertaking to keep down the annuity. Counsel for the Crown likened the case to that of a charge, but, if there could be said to be any charge in favour of the wife, it would only be a continuing charge on income so that there would be a right to make up deficiency of income in one year by having recourse to the income of another year; but there is no charge on corpus, and no right in the husband to be let into possession.

With regard to the question whether in this case "subsequent limitations continued to subsist" within the meaning of the sub-section, I agree that the point of time at which one must look for the purpose of answering that question is the time of the death of the person whose interest fails, and not any subsequent date. One has to see if any and what subsequent limitations exist at that moment of time, in order to see who is to receive the fund, and the person who receives it does so either by virtue or failure of those limitations. The wife in this case became

entitled to this property absolutely on the death of the husband by virtue of a subsequent limitation contained in the settlement, and therefore the case comes within the terms of the sub-section; and I do not think that we ought, in the case of a taxing Act, to be astute to construe it so as to defeat an immunity which prima facie appears to be given by the terms of an exempting clause.

C. A. 1906 ATTORNEY-GENERAL v. GLOSSOP. Farwell L.J.

Appeal and cross-appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Young, Jones & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1906 *Dec.* 3.

HANDFORD *v.* GEORGE CLARKE, LIMITED.

Practice—Appeal—Application by Respondent for Leave to Appear in forma pauperis—Opinion of Counsel—Order XVI., *rr.* 23, 24.

A respondent to an appeal will be allowed to appear in forma pauperis to resist the appeal without producing an opinion of counsel.

APPLICATION by the respondent in an appeal for leave to appear as respondent to the appeal in forma pauperis.

The respondent having obtained an award of compensation under the Workmen's Compensation Act, 1897, the employers appealed.

Simey, for the respondent, applied as above mentioned. The respondent has not obtained an opinion from counsel that he has reasonable grounds for resisting the appeal, but it is submitted that the practice does not in the case of a respondent require such an opinion. The rules with regard to proceeding in forma pauperis do not apply expressly to appeals, but it has been laid down that they are to be applied in the case of appeals by way of analogy: see *Ex parte Goldberg*. (1) A defendant in an

(1) [1893] 1 Q. B. 417.

C. A. 1906

HANDFORD v. GEORGE CLARKE, LIMITED.

action wishing to defend in forma pauperis is not required under Order XVI., rr. 23, 24, to produce an opinion of counsel.

[COLLINS M.R. referred to 1 Daniell's Chancery Practice, 7th ed. p. 93, as shewing that a defendant applying for leave to defend in forma pauperis was not required to produce an opinion of counsel.]

THE COURT (Collins M.R., Cozens-Hardy L.J. and Farwell L.J.) allowed the application.

Application allowed.

Solicitors for applicant: *Hennen, Edgelow & Co., for N. Bannister Way, Sunderland.*

E. L.

C. A. 1906 *Dec.* 3.

[IN THE COURT OF APPEAL.]

WOOD GREEN URBAN DISTRICT COUNCIL, APPELLANTS *v.* JOSEPH, RESPONDENT.

Local Government—Sewer—"Single Private Drain"—Pipe receiving Drainage from Sewer—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict.* c. 59), *s.* 19.

Sect. 19, sub-s. 1, of the Public Health Acts Amendment Act, 1890, applies to cases where two or more houses belonging to different owners are connected with a public sewer by a single private drain.

A number of houses in a row, six of which belonged to the respondent, and the rest to other owners, were drained in pairs in the following manner:—Each house of each pair was drained by a separate pipe into a pipe common to both houses, and each of these common pipes discharged into a line of pipes running along in private ground at the rear of the houses, which was connected with the public sewer in a street at right angles to the row of houses. The common pipes, which received the drainage from the respondent's houses, were admitted by the appellants to be "sewers" within the meaning of the Public Health Act, 1875, and not to come within the operation of s. 19 of the Public Health Acts Amendment Act, 1890:—

Held that, even if the said line of pipes were a "single private drain" within the meaning of s. 19, yet, inasmuch as the common pipes, by which the separate drains of the respondent's houses were connected with it, were sewers, the case did not come within the section, the houses

not being connected with the public sewer by a single private drain; and that the respondent, therefore, was not liable to contribute to the expense of work done to the said line of pipes under s. 41 of the Public Health Act, 1875.

CASE stated by justices under the Summary Jurisdiction Acts, 1857 and 1879.

The respondent was summoned by the appellants, as the local sanitary authority, for default in payment of 49*l.*, which they claimed as due to them, under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Acts Amendment Act, 1890, in respect of drainage works executed by them. (1)

The respondent was the owner of six houses in a row of sixteen

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55):

Sect. 4. "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed:

"'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies. . . . ."

Sect. 41. "On the written application of any person to a local authority, stating that any drain . . . . on or belonging to any premises within their district is a nuisance or injurious to health . . . . the local authority may, by writing, empower their surveyor or inspector of nuisances . . . . to enter such premises . . . . and cause the ground to be opened and examine such drain. . . . . If the drain . . . . on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty . . . . and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59):

Sect. 19 (1.). "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a Court of summary jurisdiction."

C. A. 1906

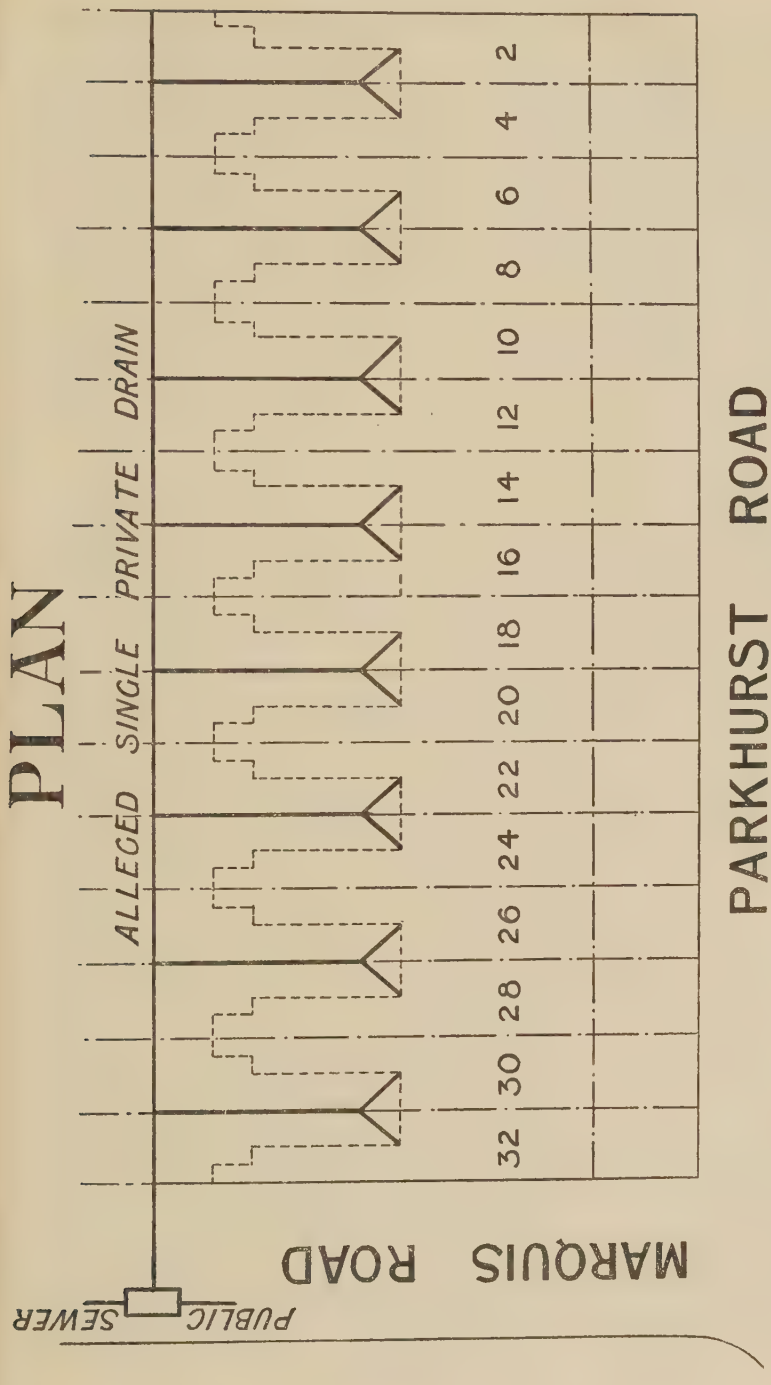
WOOD GREEN URBAN COUNCIL v. JOSEPH.

houses, the other ten houses belonging to different owners. The drainage of the sixteen houses was conveyed to a public sewer in a street by means of a system of pipes arranged as follows:—The houses were drained in pairs; each house of each pair was drained by a separate pipe into a pipe common to both houses; each of these common pipes discharged into a line of pipes, called in the case the "alleged single private drain," which was laid in private ground behind, and parallel to, the row of houses. The six houses of the respondent were connected with the line of pipes by three such common pipes. The line of pipes discharged into the public sewer. It was admitted by the appellants that each of these common pipes, which received the drainage from the respondent's houses as before mentioned, was a "sewer" within the meaning of the Public Health Acts, and that, inasmuch as the houses which they served belonged to the same owner, they did not come within the operation of s. 19 of the Act of 1890.

The plan used at the hearing is reproduced, and shews the above system of drainage. (1) A written complaint having been made to the appellants by their inspector of nuisances that a drain belonging to the row of houses, or to some one or more of them, was a nuisance, they caused the drains to be inspected, and it was reported to them that the line of pipes was in bad order and condition and required alteration and amendment. Acting on the report, the appellants gave notice to the respondent and the other owners, under s. 41 of the Act of 1875, to do the works necessary to put the line of pipes into proper order. That notice not having been complied with, the appellants did the work. The appellants alleged that the line of pipes was a "single private drain" within s. 19 of the Act of 1890, and their surveyor apportioned the cost between the owners of the row of houses, the amount apportioned on the respondent in respect of his six houses being 49*l*. Notice of the apportionment was duly served on, and payment demanded of, the respondent.

The respondent contended that the written application under s. 41 of the Act of 1875 must proceed from some person other than the surveyor or inspector of nuisances of the local authority.

(1) See next page.


PLAN
ALLEGED SINGLE PRIVATE DRAIN
PARKHURST ROAD
MR. JOSEPH'S HOUSES NOS 18 TO 28 INCLUSIVE.
2
4
6
8
10
12
14
16
18
20
22
24
26
28
30
32
MARQUIS ROAD
PUBLIC SEWER

C. A. 1906

WOOD GREEN URBAN COUNCIL v. JOSEPH.

The justices decided this point in favour of the appellants. The respondent further contended that the line of pipes was not a "single private drain" within s. 19 of the Act of 1890, and that his houses were not connected with the public sewer by that alleged "single private drain" within s. 19, because the drainage was discharged into it by means of sewers.

The justices dismissed the complaint, and stated this case for the opinion of the Court, the questions being—(1.) whether they were right in deciding against the respondent's first contention, and (2.) whether the facts stated shewed that the respondent's houses were connected with a public sewer by a single private drain within s. 19 of the Act of 1890.

Macmorran, K.C., and *Jenkin*, for the appellants. This line of pipes was a "single private drain" within s. 19 of the Act of 1890, and the fact that the respondent's houses are connected with it by means of "sewers" cannot make it any the less a "single private drain" within s. 19. The case of *Jackson* v. *Wimbledon Urban Council* (1), in the Court of Appeal, exactly covers this case, the facts being precisely similar. Though it was there admitted, and not decided, that the line of pipes corresponding to the line of pipes in this case was a "single private drain," the case is not distinguishable in principle from the present case. The contention of the respondent that the written application to the local authority cannot be made by their inspector is untenable. Sect. 41 of the Act of 1875 says that the application may be made by "any person," and those words cannot be restricted in the manner suggested.

Danckwerts, K.C., and *Randolph A. Glen*, for the respondent. The decision in *Jackson* v. *Wimbledon Urban Council* (1) proceeded upon the admission that the line of pipes which carried the sewage into the public sewer was a "single private drain," and there was no decision upon that question. It is impossible to say that a line of pipes into which a sewer empties itself is not a sewer, but a single private drain. The only logical decision is that all is a sewer or that all is a single private drain; and it cannot be held that the common pipes in this case are anything

(1) [1905] 2 K. B. 27.

but sewers which vested in the local authority: *Ferrand* v. *Hallas Land and Building Co.* (1)

The application under the Act of 1875 cannot be made by the inspector of the local authority which is to take action upon the application. It might lead to many abuses if that were permitted. "Any person" in s. 41 must mean some person other than the surveyor or inspector who has to act upon the direction of the local authority to which the application is made.

Macmorran, K.C., in reply. It would seem that in *Bradford* v. *Mayor, &c., of Eastbourne* (2) and *Thompson* v. *Eccles Corporation* (3) that which was held to be a single private drain received drainage through a "sewer."

[He referred also to *Reg.* v. *Mayor, &c., of Hastings.* (4)]

LORD ALVERSTONE C.J. It seems to me, as I have before pointed out, to be essential that there should be some amendment of the law upon this subject. The state of the authorities is such that it appears to be impossible either to reconcile the various decisions or to deduce from them any logical rule. It seems to be ridiculous that, if a pipe which receives the drainage of two or more houses belonging to the same owner is a sewer, it should cease to be a sewer if it also receives the drainage from another house belonging to another owner; and, as Wills J. pointed out in *Bradford* v. *Mayor, &c., of Eastbourne* (2), there is no reason either in justice or policy which can be urged in support of such a distinction.

I have come to the conclusion that in this case we ought to hold that the line of pipes in question is a sewer. There are in connection with the six houses belonging to the respondent what are admitted to be three sewers, that is, the three pieces of pipe which connect each pair of houses with the line of pipes in question. The arguments on both sides have proceeded upon the hypothesis that these three pieces of pipe are sewers, and I think that they could not have proceeded otherwise, because the provisions of the Public Health Act, 1875, are quite plain. It

(1) [1893] 2 Q. B. 135.
(2) [1896] 2 Q. B. 205.
(3) [1904] 2 K. B. 1; [1905] 1 K. B. 110.
(4) [1897] 1 Q. B. 46.

C. A. 1906

WOOD GREEN URBAN COUNCIL v. JOSEPH.

Lord Alverstone C.J.

is contended that, although the line of pipes in question would have been a sewer if it had taken away only the drainage of these six houses, yet it is a single private drain because it receives the drainage of other houses, although it still receives the drainage of the three sewers. That seems to me to be so absurd that I prefer, unless I am bound by any decision of the Court of Appeal, to hold, in accordance with what seems to me to be common sense, that this line of pipes has not lost its character of a sewer because it receives the drainage of the other ten houses.

Now, with regard to *Jackson* v. *Wimbledon Urban Council* (1), that which was held to be a sewer communicated with what was admitted to be a single private drain. It does not matter whether that admission was right or wrong; it was accepted as the basis of the decision both in this Court and in the Court of Appeal. It was there contended that, because the line of pipes in question ran into a single private drain, it also must be a single private drain; but it was held that the line of pipes, which was a sewer under the provisions of the Act of 1875, did not cease to be a sewer because it ran into a single private drain. It is therefore contended that in the present case the fact that a sewer runs into the line of pipes in question does not prevent its being a single private drain. There was not, however, any decision to that effect in *Jackson* v. *Wimbledon Urban Council* (1), and that case is not an authority upon this point. Then it is said that there are two cases, the later one decided in the Court of Appeal, which are binding upon this Court and shew that the line of pipes here in question is a single private drain—*Bradford* v. *Mayor, &c., of Eastbourne* (2) and *Thompson* v. *Eccles Corporation*. (3) I think, however, that there is a substantial difference between those cases and the present case. It is not stated in *Bradford* v. *Mayor, &c., of Eastbourne* (2) whether each of the houses was drained by a separate drain into that which was held to be a single private drain; but I have a strong impression that that must have been so, for I think that the language of Wills J. would have been different if a sewer had intervened between the houses and the single private drain. In *Thompson* v. *Eccles*

(1) [1905] 2 K. B. 27.
(2) [1896] 2 Q. B. 205.
(3) [1904] 2 K. B. 1; [1905] 1 K. B. 110.

Corporation (1) also it does not appear whether each house was separately drained into the single private drain; and Collins M.R. said that he agreed with and adopted the reasons given in *Bradford* v. *Mayor, &c., of Eastbourne*. (2) In that case also I think it probable from the facts which are stated that each house was separately drained into the single private drain. There is then this distinction between those cases and the present case, that here each pair of houses is connected by means of a sewer with the line of pipes. It seems to me that, when there is a line of pipes receiving the drainage of several sewers, there is no good ground for saying that it is not a sewer, and that there is no decision which says that it is not a sewer because it receives the drainage of another sewer.

With regard to the second point, I can see no good reason why a local authority cannot take action under s. 41 of the Act of 1875 upon a representation made to them by their own inspector. This appeal must, therefore, be dismissed.

LAWRANCE and RIDLEY JJ. concurred.

Appeal dismissed.

The Wood Green Urban District Council appealed.

1906. Dec. 3. *Macmorran, K.C.*, and *Jenkin*, for the appellants. The ground of the decision in the Divisional Court appears to be that it is impossible to suppose that the line of pipes in question is a single private drain within s. 19, because the pipes common to each pair of houses are sewers within the meaning of the definition of "sewer" in the Public Health Act, 1875. This argument is fallacious. It must be remembered that a single private drain within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890, is not taken out of the category of a sewer for all purposes of the Public Health Acts, but only placed in the same position as a "drain" for the purpose of throwing on the owners the expense of work done under s. 41 of the Public Health Act, 1875. For other purposes of the Public Health Acts it remains a sewer. If

(1) [1904] 2 K. B. 1; [1905] 1 K. B. 110. (2) [1896] 2 Q. B. 205.

C. A. 1906

WOOD GREEN URBAN COUNCIL v. JOSEPH.

these houses had, instead of being drained in pairs, each been connected by a pipe of its own with the line of pipes in question, it is clear that the case would have come within s. 19. It is really absurd that, because of a piece of the connection pipe being common to two houses, a different result should follow. Apart from authority, it is suggested that the logical conclusion would be that the whole system of drains by which the drains of the houses are connected with the public sewer in the street is in the category of a single private drain, but it is difficult to say that having regard to the decisions. It is submitted that upon the decided cases there is nothing to shew that the line of pipes at the rear of the houses is not a single private drain. In more than one case it has been held that a portion of one and the same pipe may be a private drain and another portion of it a sewer. The proposition that there cannot be a single private drain which receives the drainage from a sewer is contrary to *Thompson* v. *Eccles Corporation* (1) and *Jackson* v. *Wimbledon Urban Council.* (2) [They also cited on this point *Travis* v. *Utley* (3); *Bradford* v. *Mayor, &c., of Eastbourne* (4); *Reg.* v. *Mayor, &c., of Hastings.* (5)]

[FARWELL L.J. How can it be said that the houses in this case are connected with the public sewer by the single private drain, when sewers intervene between the house drains and the single private drain?]

The section does not say that the houses must be immediately connected by a single private drain with the public sewer.

Danckwerts, K.C. (*Randolph A. Glen* with him), for the respondent. There is no doubt that the results of the legislation contained in s. 19 are anomalous, and probably the draftsman who framed it had not sufficiently in mind the previous state of the law. It is contended, however, that the words of the section require an immediate physical connection by means of a single private drain between the houses and the public sewer in the street. Here there was no such connection.

[He was stopped by the Court.]

(1) [1904] 2 K. B. 1; [1905] 1 K. B. 110.
(2) [1905] 2 K. B. 27.
(3) [1894] 1 Q. B. 233.
(4) [1896] 2 Q. B. 205.
(5) [1897] 1 Q. B. 46.

C. A. 1906

WOOD GREEN URBAN COUNCIL v. JOSEPH.

COLLINS M.R. This is an appeal from a Divisional Court on a question of a kind with which, unfortunately, we are only too familiar—that is to say, a question with regard to the rights of local authorities under s. 19 of the Public Health Acts Amendment Act, 1890. The respondent is the owner of certain houses in a row, in respect of which the local authority claims the right to exercise the powers which are given by that section coupled with s. 41 of the Public Health Act, 1875, the effect of which would be to throw on the respondent the expense of work done to a certain drain which the local authority alleges to come within the category of "a single private drain." We have therefore to consider what the conditions are under which s. 19 of the Public Health Acts Amendment Act, 1890, is applicable. [The Master of the Rolls then read the section.] In order to bring the case within the terms o that section the local authority has to shew, not only that the line of pipes in question is "a single private drain," but also that two or more houses belonging to different owners are connected with a public sewer by it; and, unless the latter condition is fulfilled, the authority cannot succeed. Here the respondent is the owner of the houses numbered 18 to 28 on the plan, which are drained thus—that is to say, each pair of houses is drained by means of a drain which runs from each house respectively to a point where the two drains join, and whence the sewage is taken by a single pipe into a line of pipes at the rear of the houses. It is common ground that the single pipe which leads from the point of junction of the house drains to the line of pipes at the rear of the houses is a sewer. These pipes have been treated as sewers, and the authority has accepted responsibility for them as such. They form an initial portion of the connection between the drains of the houses and the public sewer, that connection being effected by the passage of the drainage through these sewers and then through what is alleged to be a single private drain. On the assumption that it is such a drain, has the local authority brought the case within the terms of s. 19? That section only applies where houses belonging to different owners "are connected with a public sewer by a single private drain." In this case the houses in question are not, I think, so connected, but the drains from them are

C. A. 1906

WOOD GREEN URBAN COUNCIL v. JOSEPH.

immediately connected with sewers, which then connect with the alleged single private drain. On that short ground I think that the decision of the Divisional Court should be affirmed. I do not think that it is necessary to discuss any of the cases which have been cited, for they do not appear to me to involve any points which are material to the present case.

COZENS-HARDY L.J. and FARWELL L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *Croft & Mortimer.*
Solicitors for respondent: *Miles & Hair.*

E. L.

C. A. 1906 *Dec.* 6, 7, 20.

[IN THE COURT OF APPEAL.]

THE KING *v.* MELLADEW.

Rates—Occupation—Warehouse—Intention to Occupy.

A warehouse belonging to a warehouseman was used by him for the purpose of being let as a whole, or in separate floors or rooms, for the storage of goods, or of receiving goods for storage at a rent per ton or per package per week. The warehouse having been rated to certain rates made for a city, the warehouseman, during the currency of these rates, gave notice to the rating authority that he had gone out of occupation of the warehouse. At that time there were no goods in the warehouse, and it was closed; and the warehouseman had given notice to a company, which supplied water for the purposes of the hydraulic lift on the premises, to cut off the water supply, which they did, and had removed the weights, scales, and trucks used for weighing and trucking goods on the premises to an adjoining warehouse which belonged to him. The water supply could, however, at any moment be restored on notice to the company, and the weights, scales, and trucks brought back, whenever required; and the warehouseman was still prepared to receive applications for the hire of storage room in the warehouse, and ready and willing to reopen and receive goods into it, provided that enough goods were offered to fill half of the whole capacity of the warehouse, that being the smallest quantity for which he thought it worth while commercially to open the warehouse; and a bill was posted on the premises stating that they were to let:—

Held, that there was no cessation of occupation of the warehouse by

the warehouseman, and he therefore was liable for the payment of the rates in respect of the period during which the above-mentioned state of things continued.

Overseers of Bootle v. *Liverpool Warehouse Co.*, (1901) 85 L. T. 45, distinguished.

C. A. 1906

REX v. MELLADEW.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Kennedy J. and Ridley J.) upon a case stated by justices of the city of Liverpool for the opinion of the Court of Appeal.

The matter came before the Divisional Court upon an application for a mandamus to justices to state a case, when it was agreed that, instead of a case being stated, the facts appearing upon the affidavits in support of the rule for a mandamus should be treated as if they were stated in a special case. The Court of Appeal, however, when the appeal came before them, thought that the facts were not sufficiently ascertained, and it was agreed that the justices should be asked to state a case, which they had accordingly done.

The facts stated were as follows: 1. On November 10, 1904, the appellant, being one of the collectors appointed by the council of the city of Liverpool to collect general and water rates and rents for the city, preferred a complaint at petty sessions under the Liverpool Corporation Acts, 1862 and 1893, the Liverpool Improvement and Waterworks Act, 1871, and the Local Government Board's Provisional Order Confirmation (No. 10) Act, 1895 (Session 2), stating that the defendant (who had carried on the business of a warehouse keeper under the firm name of Melladew & Son, and whose executrix was the respondent in the appeal, the defendant having died) was a person duly rated and assessed and liable to pay in respect of certain premises (being a warehouse), known as 3, Neptune Street, situate within the city, certain rates called the general rate and water rate, and also a certain water rent, all duly made for the city, on February 3, 1904, and also the said rates as aforesaid, all duly made for the city, on February 7, 1900, and that he had not for the space of fourteen days after demand in writing by the complainant paid the amount due in respect of the said rates and water rent, made on the dates aforesaid, that is to say, the

C. A. 1906

REX v. MELLADEW.

sums of 22*l.* 9*s.* 1*d.* and 7*l.* 4*s.* 5*d.* respectively, and that the same remained unpaid.

2. Pursuant to the said complaint the complainant applied for a distress warrant, but the justices refused to issue a distress warrant, and dismissed the complaint.

3. The following facts were proved or admitted: (*a*) The allowance and due publication of the rates had been made, and there had been a demand and non-payment of a portion of the rates. The unpaid balance for the year 1900 was 7*l.* 4*s.* 5*d.*, and for the year 1904, 14*l.* 4*s.* 3*d.*, and, if those sums were found to be due, the defendant was the person liable to pay them. (*b*) With the exception of the periods from October 1, 1900, to December 12, 1900, and from February 25, 1904, to July 13, 1904, the defendant admitted that he was in occupation of the warehouse during the years for which the said rates and rent were made. (*c*) During those two periods the warehouse had no goods in it and was closed, and the defendant offered to allow the complainant to keep the keys of the warehouse and invited the complainant to inspect the premises. (*d*) The warehouse was a self-contained one, and consisted of several floors, and the defendant carried on the business of warehouse keeper there and at adjoining and neighbouring warehouses by letting either the whole of each warehouse or separate floors or rooms in the same, or receiving goods at a certain rent per ton or per package per week. The warehouse formed one of a block of warehouses in Neptune Street, all under the management of the defendant and under the control of one warehouseman in the employ of the defendant. (*e*) On February 25, 1904, a letter was sent by registered post by the defendant to the superintendent collector of rates for the city in the following terms: "No 3, Neptune Street, warehouse. Please note that we have this day gone out of occupation of the above warehouse. We invite inspection." On July 13, 1904, a letter was written by the defendant to the superintendent collector of rates in the following terms: "Warehouse, No. 3, Neptune Street. Will you please note that we have reopened the above warehouse this day?" On or about October 18, 1900, and December 12, 1900, letters in similar terms to the above were sent by the defendant to the superintendent collector of

rates. (*f*) A bill was posted on the premises during each of the two periods. The words in the bill posted on the premises in the 1900 period were as follows: "To let. Apply to J. B. Melladew & Son, 1, Fenwick Court." The words in the bill posted on the premises in the 1904 period were as follows: "To let. Apply to J. B. Melladew & Son, 41, Old Hall Street." (*g*) During those two periods the supply of water at high pressure for working the hydraulic lift in the premises was, pursuant to a notice given by the defendant to the Hydraulic Power Company, cut off, the defendant thereby saving the minimum charges payable to that company for the supply of water pressure during such period as the lift was not being used. The defendant was able to get the supply put on at any moment upon notice being given to the company. (*h*) During those two periods the weights, scales, and trucks used for weighing and trucking goods were removed to and stored in an adjoining warehouse next door, but having no communication with the one in question, and in the occupation and use of the defendant, but they were there very handy and could be got whenever they were required. (*i*) Throughout the rating years 1900 and 1904 the defendant continued to carry on the business of warehouse keeper in Neptune Street and elsewhere in Liverpool. Subject to the facts stated in paragraphs (*g*) and (*h*) the warehouse was ready for the receipt of goods at any minute, and the defendant was at all times throughout the said periods prepared to receive applications for the hire of storage room, and ready and willing to reopen the warehouse and receive goods into it, provided that enough goods were offered to fill half the whole capacity of the warehouse, this being the smallest quantity for which he thought it worth while commercially to open the warehouse. With this proviso he was prepared to reopen the warehouse and to let either the whole of it or separate floors or separate rooms, or to let floor space at a tonnage or package rent. Subject to the above-mentioned minimum limit, the defendant throughout the two periods was willing to receive goods at the warehouse.

4. The defendant contended that by the decision in *Overseers*

C. A. 1906

REX v. MELLADEW.

of Bootle v. *Liverpool Warehousing Co.* (1) the justices were bound to find that the above facts did not constitute an occupation for rating purposes.

5. The complainant contended—(*a*) that the facts of the *Bootle Case* (1) were distinguishable, because there it may have been arguable that there was evidence of an intention to exclude the warehouse from the list of warehouse accommodation which the warehouse keepers intended to utilize for trade purposes during the whole rating year; (*b*) that, if the *Bootle Case* (1) was not distinguishable, it was wrongly decided; (*c*) that there was no evidence of an intention to cease occupation of the warehouse, nor that the defendant had in fact ceased to occupy it; (*d*) that warehouses are a class of property of which intermittent user is characteristic, and that the assessment committee of the parish of Liverpool had, in assessing the warehouse, made an allowance in respect of such user by calculating at an annual rent of 1*s.* $3\frac{3}{4}$*d.* per square yard of floor space instead of 1*s.* 6*d.*; (*e*) that the only inference of law which could be drawn from the facts was that the defendant continued in occupation.

6. The justices were of opinion that the Bootle decision was applicable; that they had nothing to do with the principle of assessment; that the defendant, by giving the notice contained in the letters referred to in paragraph 3 (*e*) and by offering to give up the key of the warehouse, did not intend to reopen it without giving the complainant due notice; that the words of the bill referred to in paragraph 3 (*f*) had no special meaning attached to them by trade usage, local custom, or otherwise; and that the question of occupation was one of fact for them to decide.

7. They therefore held that the defendant was not in occupation of the premises during the two periods, and dismissed the complaint and refused to issue the distress warrant asked for.

8. The question for the Court was whether their determination was correct in point of law.

The Divisional Court, upon the facts before them, held that the case was not distinguishable from that of *Overseers of Bootle*

(1) 85 L. T. 45.

v. *Liverpool Warehousing Co.* (1), and gave judgment for the defendant. (2)

Dec. 6, 7. *Pickford, K.C.*, and *Leslie Scott* (*Konstam* with them), for the appellant. The decision of the justices in this case was wrong in point of law. What amounts in law to "occupation" of premises must vary according to the character of the particular premises in question. Occupation is in many cases constructive, and the decisions shew that the existence of constructive occupation, in the absence of actual physical occupation, depends mainly on the intention manifested. The occupation of a warehouse is different from that of a dwelling-house. The use of a dwelling-house is by actual inhabitancy, and the purposes of a dwelling-house require furniture. A man may occupy a dwelling-house by his servants or his furniture; and, if he removes his furniture and seeks to let the house, his occupation ceases, because his intention is not to occupy the house himself, but that someone else should occupy it. Altogether different considerations apply to the case of a warehouse. A warehouse is practically an unfurnished building, and its business use is by letting unoccupied space therein for the purpose of storing goods. It is therefore occupied by its owner for the purposes of his business as long as he intends to use it by taking in goods for storage, if and as soon as such are forthcoming. It does not cease to be occupied by reason of there happening at any particular moment to be no goods stored in the warehouse. If the owner still retains control over the warehouse, and intends to carry on his business there at any moment when a sufficient amount of goods for storage is forthcoming to make it worth his while to take them in, he must still be considered as occupying the warehouse. Here the defendant was ready, and intended, to use the

(1) 85 L. T. 45.

(2) Exemption in respect of the cessation of occupation was claimed under local Acts relating to Liverpool, namely, the Liverpool Improvement Act, 1858 (21 & 22 Vict. c. lxxx.), s. 31, and the Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), s. 37, but there was nothing in their terms to differentiate the question from that which would under similar circumstances have arisen with regard to poor rate.

C. A. 1906

REX v. MELLADEW.

warehouse at any moment when storage was required for a sufficient quantity of goods to make it commercially profitable. The case of *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1) is distinguishable from the present case, because the inference there was that there was no intention to use the warehouse for business purposes for the period of twelve months. If that case is not distinguishable from the present, it is submitted that the decision there was wrong, and it is not binding on the Court of Appeal. The question in the present case is not merely one of fact. The justices appear to have thought that they were bound by the decision in *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1) to find that, as a matter of law, there was no occupation in the present case; and the question meant to be asked in the case really is whether they were right in law in so holding. The question of occupation is no doubt a question of fact for the justices, but, if they have arrived at their decision upon a misdirection of themselves in point of law, the Court can review that decison. [They also cited *Staunton* v. *Powell* (2); *Harter* v. *Salford Overseers* (3); *Allan* v. *Liverpool Overseers* (4); *Mayor, &c., of Southend* v. *White* (5); *Gage* v. *Wren* (6); *Rex v. Mirfield.* (7)]

Macmorran, K.C., and *A. H. Maxwell*, for the respondent. Where there is occupation, the question whether it is beneficial, so as to give rise to rateability, or not, is no doubt a question of law. But the question whether there is occupation is one of fact for the justices: see *Reg.* v. *Bradshaw* (8); *Harter* v. *Salford Overseers.* (3) It has always been recognized that by law premises which are in fact unoccupied cannot be rated. The fact that a person is owner or tenant, and is legally in possession of premises, does not render him liable to be rated in respect of them, if they are in fact unoccupied, even although that state of things is brought about by his volition: *Rex* v. *Bedworth* (9); *Rex* v. *St. Luke's Hospital.* (10) So an unoccupied and unfurnished dwelling-house is not rateable,

(1) 85 L. T. 45.
(2) (1867) 15 W. R. 362.
(3) (1865) 6 B. & S. 591.
(4) (1874) L. R. 9 Q. B. 180.
(5) (1900) 83 L. T. 408.
(6) (1902) 87 L. T. 271.
(7) (1808) 10 East, 219.
(8) (1860) 2 E. & E. 836.
(9) (1807) 8 East, 387.
(10) (1760) 2 Burr. 1053.

and the putting up of a notice offering to let the house is not evidence of occupation by the owner. Under the old law, if a person was in occupation at the time when the rate was made, he was liable for the whole rate, although he might be out of occupation for some period during the currency of the rate. Now, by virtue of the provisions of 32 & 33 Vict. c. 41, s. 16, and 45 & 46 Vict. c. 20, s. 3, the person so rated is only liable to pay a proportion of the rate in respect of the period during which he has occupied the premises. The question whether there is occupation is a question of fact, depending on all the circumstances of each particular case, and must often be a question of degree; e.g., leaving all the furniture in an uninhabited dwelling-house might be occupation of it, while leaving one or two odd articles in it would not. The question is one which, if the case had to be tried with a jury, would be a question of fact for the jury, and not one of law for the judge. Here the justices have found that, as a fact, there was no occupation, and it cannot be said that there was no evidence to support their finding. The mere fact that the cessation of occupation of the warehouse was for an indefinite period, which might at any moment come to an end, cannot in principle afford any ground of distinction between the present case and *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1) In that case there was nothing in law to prevent the owners of the warehouse from using it again for the storage of goods at any time before the twelve months had expired, if they thought they could profitably do so. The mere invitation to the public to hire storage room in the warehouse does not amount to occupation as long as the premises are unlet and so remain in fact unoccupied. The fact that the owner can at any moment reoccupy them cannot amount to occupation. Nor can the existence of an intention to reoccupy them, as soon as it becomes profitable to do so, be material. The owner of a dwelling-house, who goes out of occupation and tries to let the house, may intend to reoccupy it, if he cannot let it, but that would not constitute constructive occupation of it. There is nothing in the case to shew that the justices were of opinion that in fact there was occupation, but felt themselves constrained

(1) 85 L. T. 45.

C. A. 1906

REX v. MELLADEW.

by the decision in *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1) to hold, as a matter of law, that there was not, as suggested for the appellant. [They also cited *Reg.* v. *Verrall* (2); *Governors of Bristol Poor* v. *Wait* (3); *Holywell Union* v. *Halkyn District Mines Drainage Co.* (4)]

Pickford, K.C., for the appellant, in reply, cited *Roberts* v. *Aylesbury Overseers.* (5)

Cur. adv. vult.

Dec. 20. COLLINS M.R. read the following judgment:—This is an appeal from a decision of the Divisional Court affirming the order of justices refusing to enforce the payment of certain rates in respect of a warehouse in Liverpool, alleged to have been in the occupation of the defendant during the period covered by the rates. The matter comes before us upon a special case stated by the justices at the request of this Court upon a former hearing, when the Court was differently constituted. The respondent contends that the defendant was out of occupation of the premises during a portion of the periods covered by the rates in question, and claims exemption under a local statute during the time that he was thus out of occupation. Paragraphs 3, 4, 7, and 8 of the special case are as follows. [The Master of the Rolls read paragraphs 3, 4, 7, and 8 of the special case, as set out above, and continued:—] It will be seen, therefore, that we have to consider whether on the facts stated the justices were right in point of law in holding that the defendant was not in occupation during the periods named. The Divisional Court held that the question was concluded by its decision in *Overseers of Bootle* v. *Liverpool Warehousing Co.* (1), on which the justices had purported to act, and accordingly refused to interfere with their decision.

It is important to remember, in dealing with questions of liability to pay rates, that occupation, which is the basis of liability, necessarily varies with the nature of the rateable subject-matter. The acts necessary to establish occupancy of a

(1) 85 L. T. 45.
(2) (1875) 1 Q. B. D. 9.
(3) (1834) 1 A. & E. 264.
(4) [1895] A. C. 117.
(5) (1853) 1 E. & B. 423.

dwelling-house may be very different from those which might be required to establish occupation of a non-habitable hereditament. It is, I think, clear from a comparison of many authorities that the intention of the alleged occupier in respect to the hereditament is a governing factor in determining the question whether rateable occupancy has been established. For instance, the physical presence, actual or constructive, of the alleged occupant upon the hereditament may be consistent with the position of licensee or lodger as well as with that of an occupier in the sense required to establish rateability. "In order to ascertain this," says Blackburn J. in *Allan* v. *Overseers of Liverpool* (1), "we must see what was the intention of the parties." So, in a case where an owner had put up his house to let, and had placed or left furniture in it, that eminent judge the late Christian J. says: "The presence of furniture has its chief bearing on the case with reference to the animus habitandi. . . . . If a man leaves furniture in a house, or sends furniture to a house, the presumption is in favour of the animus revertendi, or habitandi": see *Staunton* v. *Powell.* (2) So, in the case of the tenant of a boarding-house—*Gage* v. *Wren* (3)—which could only be carried on profitably for a short period in the year, who at the end of the season had withdrawn the furniture with the exception of a few tenant's fixtures and fitted mats, but who had never relinquished the intention of returning to reopen the house as a boarding-house in the coming season, it was held that she had never ceased to occupy so as to be liable for rates; Lord Alverstone C.J. and Darling J. relied, it would seem, exclusively on the intention to be inferred from the nature of the business, and Channell J. expressed entire agreement with them, though he also relied on the fact of the chattels left behind as evidence of actual occupation: see also *Mayor, &c., of Southend* v. *White.* (4) Darling J. invoked the analogy of fruit trees, which may possibly call for no active interference until the fruit is ripe, but yet are to be deemed as occupied during the period that the fruit is ripening. The like principle has been applied to saleable

(1) L. R. 9 Q. B. 180, at p. 192.
(2) 15 W. R. 362.
(3) 87 L. T. 271.
(4) 83 L. T. 408.

C. A. 1906

REX v. MELLADEW.

Collins M.R.

underwoods which were cut only at intervals of twenty years: *Rex* v. *Mirfield.* (1)

To come to the case before us, the business of a warehouseman need not involve the actual presence on the premises either of the warehouseman himself, or of any representative, or of any movable chattels. If he has the necessary appliances ready for use when the demand for storage comes, he is in a position to do business to which the physical occupation of the premises is indispensable. If he holds himself out to let storage space not involving a demise of the whole warehouse, and, by securing exclusive control over the premises, has put himself in a position forthwith to give the accommodation required, is he to be deemed as not the occupier until some customer has been found to deposit goods for storage? And when he has secured customers, and his warehouse has afterwards again become empty, is he to be deemed as having ceased to occupy? I cannot think that this can be so. I am aware that ownership is distinct from occupation, and that an owner does not make himself rateable by trying to let an house which he has ceased to inhabit. But the principle involved in that proposition does not apply to the case of the tenant of a vacant warehouse who retains control over it for the purpose of letting storage room. In the case of the owner seeking to find a tenant in the case put, no assertion of occupation by him is involved. If he gets a tenant, he substitutes the occupation of another person for his own. The warehouseman in getting a customer supplies visible evidence of his own occupation. In the case of the owner who tries to let the intention is not to occupy. In the case of the warehouseman it is exactly the reverse. It seems to me on the facts found by the justices, which I need not repeat, that the intention of the defendant here was as far as possible to avoid the semblance of occupation while carefully guarding the substance. He carefully retained the control, while his continuous intention was to utilize the premises for the purpose of his business whenever the opportunity offered. With regard to the *Bootle Case* (2), on which the Court below seem to have acted, I think it is distinguishable, as the Court found there a bona fide intention " not to occupy, not to carry on the business

(1) 10 East, 219. (2) 85 L. T. 45.

of the respondents in those particular premises": see per Bigham J. (1) Here the justices have found for us the facts as to intention in the paragraphs above cited, and have requested our opinion as to whether their decision in the case was correct in point of law. For the reasons I have given I think it was not. I should add that the facts before us appear to be somewhat more fully stated than they were in the Divisional Court. With the greatest respect to them, I think the appeal must be allowed.

COZENS-HARDY L.J. I have had the opportunity of reading and considering the judgment of the Master of the Rolls. I entirely agree with it, and do not desire to add anything to it.

FARWELL L.J. read the following judgment:—This is a case stated by justices, and raises the question whether the defendant "ceased to be occupier" of a certain warehouse in Liverpool within the meaning of s. 31 of the Liverpool Improvement Act, 1858, and s. 37 of the Liverpool Corporation Act, 1893.

The question is one of actual, not beneficial, occupation. It is not disputed that property that is in fact unoccupied is not liable to be rated; and it is contended (1.) that this warehouse was unoccupied; and (2.) that in any case this is a question of fact for the justices. Whether premises are or are not unoccupied is in many cases a mixed question of fact and of law; there may be visible physical occupation by the person rated, or his servant, or his goods and chattels, and such occupation may be of part of an undivided tenement; and, if in such a case occupation is found as a fact by the justices, no appeal will lie. But these do not exhaust all the cases of occupation. Rateable property has many varieties; of some the normal use is by personal occupation, e.g., a dwelling-house, of others by occupation by live or dead stock, e.g., a linhay used as a shelter for cattle, or a barn; and the nature of the property and its mode of use must be considered in each case. The test, in a case like the present, of business premises, appears to me to be, Has the person to be rated such use of the tenement as the nature of

(1) 85 L. T. 45, at p. 48.

C. A. 1906

REX v. MELLADEW.

Farwell L.J.

the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it? In many trades, and certainly in a warehouseman's, the trader must necessarily contemplate the occupation for considerable periods of parts of his premises as spare room. If and so long as he uses the premises for the purposes of his business, he is in occupation of them for rating purposes: see the judgment of Darling J. in *Gage* v. *Wren*. (1) In the present case the warehouse is used for the purposes of a warehouseman's trade, and is full, half full, or empty from time to time according to the fluctuations of trade; but it appears to me impossible to hold that it fluctuates in point of rateability in like manner. Floors or separate warehouses for the time being empty do not thereupon cease to be rateable and continue free until used, even although there are no chattels, and nothing but landlord's fixtures therein, because the warehouseman has the use of them as spare room for the purposes of his trade. If he shuts them up altogether, and gives up his business in connection with them, they cease to be rateable; but, if and so long as he carries on his business there, and holds them ready for use in and as part of such continuing business, he remains rateable. The question must be whether they are kept in such a state as to be capable at any time of being used in a continuing business. Treating this as the test, the *Bootle Case* (2) was rightly decided, because the business in connection with the warehouses in that case ceased to be carried on; the warehouses were shut up and withdrawn absolutely from their owner's trade. But in the present case the contrary is the fact; it is true that the water is cut off, but it can be turned on again at a moment's notice [paragraph 3 (*g*)], and that the weights and scales and trucks were moved into the owner's warehouse next door, but they could be got in again as soon as required [paragraph 3 (*h*)]. Provided it was worth his while commercially, the owner was prepared to reopen the warehouse and to let either the whole of it or separate floors, or to let floor space at a tonnage or package rent [paragraph 3 (*i*)]. Under these circumstances I find it impossible to say that the defendant has ever given up the use of this warehouse, or withdrawn it

(1) 87 L. T. 271. (2) 85 L. T. 45.

from his business so as to cease to occupy it within the meaning of the Act. He has merely kept it as spare room.

C. A. 1906

REX v. MELLADEW.

Farwell L.J.

Then it is said that the justices have found non-occupation as a fact. I do not so read the case. They refer to the Bootle decision (1) as governing the case, but its applicability is a question of law, or at least of mixed law and fact, and the question left to us in paragraph 8 is whether as a matter of law they came to a correct decision. I read the case as amounting to a statement that the justices conceived that the *Bootle Case* (1) established a principle, and that such principle is applicable to the present case. In my opinion they have come to an erroneous conclusion, and this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for Pickmere, Liverpool.*

Solicitors for respondent: *Wyatt & Co., for Whitley & Co., Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1906 *Dec.* 17, 18.

FLETCHER *v.* BIRKENHEAD CORPORATION.

Waterworks—Injurious Affection of Land—Loss of Support—Authorized Working—Construction as distinguished from User of Works—Compensation—Construction of Statutes—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12.

Sects. 6 and 12 of the Waterworks Clauses Act, 1847, are, notwithstanding the heading of the group of sections to which they belong, to be construed as providing for compensation to landowners in respect of the injurious affection of their lands by the taking of water found in and under the lands taken for the construction of waterworks, for the purposes of the waterworks after the completion of the structural works.

General words in the heading of a group of sections cannot be construed as limiting the effect of plain words in a section contained in that group.

So *held*, affirming judgment of Bray J., [1906] 1 K. B. 605.

Hammersmith and City Ry. Co. v. *Brand*, (1869) L. R. 4 H. L. 171, distinguished.

APPEAL from the judgment of Bray J. (2) in an action tried by him without a jury.

(1) 85 L. T. 45.

(2) [1906] 1 K. B. 605. Since the judgment the plaintiff had died, and his executor had been made party to the appeal.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

The action was brought upon an award to recover 1200*l.*, the amount assessed by an umpire in an arbitration under the Waterworks Clauses Act, 1847, as compensation for injurious affection of the plaintiff's house by the exercise by the defendants of the powers conferred upon them by the Birkenhead Corporation (Gas and Water) Act, 1881, which incorporated the provisions of the Waterworks Clauses Act, 1847. The defence to the action was that the award was ultra vires and in excess of jurisdiction, and that on the findings of the umpire the defendants were under no legal liability to the plaintiff.

The defendants had under their Act acquired a piece of land, and had sunk a well or borehole on that land, distant about 150 yards from the plaintiff's dwelling-house. They had, for the purposes of water supply, pumped water from the well or borehole, the result of which was that a large quantity of silt had been abstracted from under the plaintiff's house, and a settlement had thus been caused by reason of the withdrawal of support, by which the house had been damaged. No portion of the plaintiff's land had been taken by the defendants for the purposes of their waterworks. The facts as found by the umpire in his award appear from the judgment, and are fully stated in the report of the case in the Court below. (1) The learned judge gave judgment for the plaintiff. (1)

Horridge, K.C., and *F. E. Smith*, for the defendants. This case is governed by the decision of the House of Lords in *Hammersmith and City Ry. Co.* v. *Brand*. (2) It was there held, with reference to the Railways Clauses Consolidation Act, 1845, ss. 6 and 16, that the heading of the group of sections to which they belonged, the words of which heading are "and with respect to the construction of the railway and the works connected therewith," must be taken to control the construction of the sections; and, consequently, it was decided in that case that compensation could not be awarded for damage caused by user of the railway, when constructed, as distinguished from its construction. Sects. 6 and 12 of the Waterworks Clauses Act, 1847, belong to a group of sections in that Act introduced by a heading similar

(1) [1906] 1 K B. 605. (2) L. R. 4 H. L. 171.

to that of the sections in the Railways Clauses Consolidation Act, 1845, which were the subject of the decision in the case of *Hammersmith and City Ry. Co.* v. *Brand.* (1) The expressions upon which reliance will be placed for the purpose of shewing that ss. 6 and 12 of the Waterworks Clauses Act, 1847, give compensation for matters going beyond construction do not, when construed in relation to the governing words of the heading, bear the suggested meaning. The word "supplying" in the phrase "constructing or supplying waterworks" in s. 6 does not mean "supplying water" to the waterworks, but contemplates the possibility of the purchase by the undertakers of an existing water undertaking, instead of constructing one de novo. Similarly the word "maintenance" in the section must be construed as pointed to structural works which may become necessary subsequently to the original construction of the waterworks. It is not an apt word to use as meaning the supply of water. There is nothing in the words of ss. 6 or 12 which, according to their true construction as controlled by the heading, points to user as distinguished from "construction." The expression "from time to time" in s. 12 is fully satisfied by construing it as meaning "from time to time during the construction of the works." [They also cited *Holliday* v. *Mayor of Wakefield* (2); *Reg.* v. *Wycombe Ry. Co.* (3); *Emsley* v. *North Eastern Ry. Co.* (4); *Fenwick* v. *East London Ry. Co.* (5)]

Pickford, K.C., and *Leslie Scott*, for the plaintiff, were not called upon to argue.

COLLINS M.R. This is an appeal from a judgment of Bray J. in an action brought upon an award, by which compensation was assessed for damage occasioned to the plaintiff's house by the operations of the defendants in the exercise of powers given by their special Act and the Waterworks Clauses Act. The plaintiff alleged that his house had been injured by the subtraction from under it of subjacent soil, which was in the nature of a running silt, by the defendants' operations in pumping

(1) L. R. 4 H. L. 171.
(2) [1891] A. C. 81.
(3) (1867) L. R. 2 Q. B. 310.
(4) [1896] 1 Ch. 418.
(5) (1875) L. R. 20 Eq. 544.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Collins M.R.

water. The damage so alleged by the plaintiff became the subject of an arbitration, and the umpire found by his award as follows: "1. The corporation have by the authorized working after the completion of the authorized works occasioned damage to the property of the claimant, that is to say, by from time to time taking such water as was found in and under the lands taken by the corporation for constructing their works and authorized under the powers to be taken for the purposes of their undertaking. 2. (*a*) Such damage was not occasioned by the abstraction of water only; (*b*) such damage was occasioned by the abstraction of water which carried with it silt from under the premises of the claimant. 3. The weight of the buildings upon the land has not caused the damage. 4. The amount of damage done to the said hereditaments of the claimant is 1200*l*., which sum is to be paid by the said corporation to the said Isaac Fletcher." The second finding of the umpire was thought by the learned judge to be ambiguous, and he therefore, with the consent of counsel, asked the umpire to clear the matter up by answering a question in the following terms: "Was the substance or object which lay directly under and formed the support of plaintiff's land, and the abstraction of which caused subsidence and damage, (*a*) a bed of wet or running silt, as contended by the plaintiff, or (*b*) a stratum of water in which some silt was held in suspense, as contended by the defendants?" To that question the umpire gave the following answer: "The subsoil which lay directly under and formed the support of the plaintiff's land was a bed of wet running silt, which was drawn away by the pumping operations of the corporation." That question was put in order to see whether the case came within the authority of *Jordeson* v. *Sutton, Southcoates, and Drypool Gas Co.* (1) And the effect of the answer given was to bring it within that authority. The learned judge thereupon, after argument as to the effect of the Waterworks Clauses Act, 1847, gave judgment in favour of the plaintiff, against which judgment the present appeal is brought.

The question in the case arises thus. It is contended by the defendants that the operation which brought about the damage

(1) [1899] 2 Ch. 217.

to the plaintiff's house was incidental to the working of the defendants' waterworks, and not to their construction; and, that being so, that the damage complained of was analogous to the effect upon neighbouring property of vibration resulting from the use of a railway, when completed, by running locomotives and carriages upon it, which was the subject-matter of the decision in *Hammersmith and City Ry. Co.* v. *Brand.* (1) It is said that, although the question arose in that case under the Railways Clauses Consolidation Act, whereas that in the present case arises under the Waterworks Clauses Act, the two enactments are so similar that an authority upon the construction of one of them is an authority upon that of the other; and that this case, therefore, comes within the principle laid down in that case in the House of Lords, whereby compensation for damage incidental to the working of a railway, as distinguished from its construction, was excluded, the pumping of water by the defendants in this case standing on the same footing for the present purpose as the use of the railway by running trains upon it did in that case. The question we have to decide is whether that contention is right. The learned judge held that it was not.

It seems to me that the defendants are met in limine with the difficulty that there is not in fact that analogy which they seek to establish between the running of locomotives and carriages on a constructed railway and the pumping operation in the case of waterworks by which the reservoir is filled. The latter seems to me really to come within the category of construction for the present purpose, whereas the former is a mere user of the railway for the purposes of carrying out the scheme of the railway company's Act by running trains on the completed line.

But, apart from this consideration, I will presently call attention to the difference between the enactments in the two cases.

The works which were to be executed by the defendants are described in s. 20 of their special Act, the Birkenhead Corporation (Gas and Water) Act, 1881 (44 & 45 Vict. c. clii.), which is as follows: "Subject to the provisions of this Act, the corporation may make and maintain in the line and according to the

(1) L. R. 4 H. L. 171.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Collins M.R.

levels shewn on the deposited plans and sections the waterworks hereinafter described, with all proper wells, tunnels, drifts, adits, pipes, embankments, approaches, tanks, basins, engines, pumps, and other works and conveniences connected therewith respectively. . . . . The waterworks hereinbefore referred to and authorized by this Act are—(1.) a shaft or well (to be sunk to an uncertain depth) and pumping station in the township of Upton, in the parish of Overchurch, or in the township of Bidston-cum-Ford, in the parish of Bidston, near the bridge carrying the road leading from Birkenhead to Upton over the stream known as the Fender; (2.) an aqueduct or line of pipes from the said intended pumping station to the reservoir of the corporation at Flaybrick Hill; (3.) a reservoir in the township of Bidston upon Bidston Hill near and to the south of the windmill on the said hill; (4.) an aqueduct or line of pipes commencing near the Bidston toll-bar by a junction with the intended line of pipes hereinbefore described, and terminating at the intended reservoir on Bidston Hill." Therefore the Act contemplates not merely that structures capable of holding and conducting water should be made, but that the operations should embrace the filling of the reservoir with water, without which the works could not really be said to be waterworks at all. The essence of the whole scheme is that the water should be conducted to the reservoir, whence, by the operation of gravity, it may be distributed over a large area. That this was the intention is emphasized by subsequent sections as to supply of water, e.g., s. 23 of the Act, which provides that: "The corporation shall, when the pumping station is completed, deliver daily, when required, into a proper pipe or cistern to be provided by William Vaudrey on land belonging to him in the parish of Upton adjoining the pumping station, a supply of water which shall be sufficient to supply any and every house or tenement that may now or hereafter be erected on the said land, not exceeding twenty gallons per head per day on the number of inhabitants of each house at a price of not exceeding fourpence for every one thousand gallons supplied." These provisions contemplate, as the result of the completion of the works, that the corporation shall be in a position to distribute water; that not only

shall the structural appliances, such as a reservoir and the pumping apparatus necessary for procuring the water, be in existence, but that there shall be water in a condition to be delivered to consumers. Therefore, it seems to me that in the first place, even if the compensation given must be treated as limited to damage caused in the course of the construction of the waterworks, as distinguished from their mere use when constructed, the operation by which the damage in this case was occasioned comes within the category of construction.

But, apart from that, when one contrasts the sections of the Waterworks Clauses Act, 1847, with the sections of the Railways Clauses Consolidation Act, 1845, which were the subject of decision in *Hammersmith and City Ry. Co.* v. *Brand* (1), I think that it is clear that that case is distinguishable from the present; and that it does not follow, because the damage caused by vibration in that case, not being incidental to the construction of the railway, was not the subject of compensation under the Railways Clauses Consolidation Act, that the damage caused by the operation of pumping water under the Waterworks Clauses Act is on the same footing as being incidental not to the construction, but merely to the user of the works when constructed. Turning to ss. 6 and 12 of the Waterworks Clauses Act, it will be seen, I think, that the powers given by them relate not only to construction, but also to maintenance and user, as a whole, of the subject-matter which was to be brought into existence, namely, the waterworks; and that they differ greatly from ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, upon which the case of *Hammersmith and City Ry. Co.* v. *Brand* (1) turned. I think that s. 6 of the Waterworks Clauses Act, 1847, is more important in relation to this case than s. 12. I will proceed to contrast its phraseology with that of s. 6 of the Railways Clauses Consolidation Act, 1845. The latter section is prefaced by the words, "And with respect to the construction of the railway and the works connected therewith." That is what has been spoken of in argument as the heading or preamble of a "fasciculus" of

(1) L. R. 4 H. L. 171.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Collins M.R.

sections dealing with the matters thereby indicated. Sect. 6 enacts as follows: "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company." This section was construed as limiting the compensation for injurious affection of property to matters arising out of the construction of the railway and works connected therewith; and the words of the heading, to which I have referred, were made use of as throwing a strong light on the purport of the section. They were relied on as shewing that the whole scope of the enactment related to injury occasioned by construction, and, that being its governing feature, its effect was not extended by the subsequent words, "all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company." Turning to s. 6 of the Waterworks Clauses Act, 1847, I find that its terms are not limited to the "construction" of waterworks, but it refers to "maintenance," as well as construction of the waterworks. There is first of all the preliminary heading, "And with respect to the construction of the waterworks"; and it then proceeds to provide for cases "where by the special Act the undertakers shall be empowered, for the purpose of constructing or 'supplying' waterworks, to take or use any lands." So that the provisions of the section are not confined to "constructing," but also extend to "supplying" waterworks, whatever that may mean. It enacts that in such cases the undertakers "shall make to the owners and occupiers of and all other parties interested in any lands or streams taken or

used for the purposes of the special Act, or injuriously affected by the construction or 'maintenance' of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith." Contrasting the two sections, there appears to me to be a radical difference between them. It may well be said of s. 6 of the Railways Clauses Consolidation Act, 1845, as it was in *Hammersmith and City Ry. Co.* v. *Brand* (1), that it is prima facie limited to matters of construction, and that the words of the heading throw light on what comes after; and that, there being some ambiguity in the subsequent provisions, the weight of that heading thrown into the scale preponderates in favour of the view that those provisions must be limited to matters of construction. But, when one looks at the terms of s. 6 of the Waterworks Clauses Act, 1847, they seem to be very different; and, unless we are precluded from construing them in their natural sense, I should say that the natural meaning of the word "maintenance" was that it included matters going beyond construction, and that it enlarged the effect of the words "or otherwise by the execution of the powers thereby conferred," so as to cover damage occasioned otherwise than by mere works of construction. The introduction of that word "maintenance" seems to me to shew that the powers intended to be referred to in the provisions for compensation must embrace powers going beyond construction. Therefore, it seems to me that the provisions of the two sections are so different that the construction of one could not for the present purpose throw any light on the other. The head-note to the report of the case of *Hammersmith and City Ry. Co.* v. *Brand* (1) seems to me to state fairly the result of that decision, as being that "the headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any

(1) L. R. 4 H. L. 171.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Collins M.R.

particular heading." Lord Chelmsford said, in giving judgment (1): "The sections of the Railways Clauses Acts are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following: and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading." Assuming that Lord Colonsay, who agreed with Lord Chelmsford, acted upon the same view, the result seems to be as expressed in the head-note. Therefore there must be some ambiguous expression in the body of the section before the aid of the heading can be invoked to define its meaning. As pointed out by Bray J. in his judgment, if the meaning of an expression in the section is clear, it cannot be controlled by the heading. It seems to me, when one looks at the terms of s. 6 of the Waterworks Clauses Act, 1847, that the words of the heading may be abundantly satisfied by saying that they indicate what is the main subject of the section, namely, construction, but do not necessarily exclude matters which go beyond construction, and that, when one finds in the section words which, without ambiguity, point to more than mere construction, the case of *Hammersmith and City Ry. Co.* v. *Brand* (2) is no authority as to its effect. It appears to me to be very natural that, in a section dealing mainly with construction, some provision should be introduced dealing with matters which follow construction, and here the section provides in terms, not only for construction, but also for maintenance of the waterworks. If there were no such words in the Act as those which form the heading of the group of sections of which s. 6 is one, I think that no one could doubt that the words "by reason of the exercise, as to such lands and streams, of the powers, &c.," would embrace the pumping, which is necessary to give effect to the whole scheme of water supply under the Act, and to the effective existence of the contemplated waterworks as such. Without the pumping the waterworks would never really come into existence as waterworks. I think that, if this operation is not covered by the word "construction," it clearly is by the word "maintenance," and that the powers, in respect of the

(1) L. R. 4 H. L. 171, at p. 203. (2) L. R. 4 H. L. 171.

exercise of which compensation is given, include the power of maintaining the supply of water to the waterworks by pumping. We are not bound by the authority of *Hammersmith and City Ry. Co.* v. *Brand* (1) to do more than to regard expressions which are ambiguous as controlled by the words of the preliminary heading, and to words which are not ambiguous the principle of that decision will not apply. I agree with Bray J. that the words of the Waterworks Clauses Act, 1847, s. 6, so clearly go beyond matters of construction, that they cannot be treated as limited by the heading to such matters. So much for s. 6. Then there is the other section of the Waterworks Clauses Act, s. 12, which corresponds with s. 16 of the Railways Clauses Consolidation Act, 1845, and upon which the learned judge in the Court below mainly based his judgment. I do not wish to repeat what I have said as to s. 6, but I think that it applies with equal force to s. 12, as contrasted with s. 16 of the Railways Clauses Consolidation Act. I will not go in detail through the two sections, but I think that differences will be found between them corresponding to those between s. 6 of the Waterworks Clauses Act, 1847, and s. 6 of the Railways Clauses Consolidation Act, 1845. Sect. 12 empowers the undertakers "from time to time to divert and impound water from the streams mentioned for that purpose in the special Act, or the said plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works." These latter words clearly point to the continued supply of water by pumping, and by the section full compensation is to be made "to all parties interested for all damage sustained by them through the exercise of such powers." For these reasons I am of opinion that the judgment of Bray J. was right and should be affirmed.

COZENS-HARDY L.J. I so entirely agree with the judgment of Bray J. in the Court below, and with the judgment of the Master of the Rolls, that I have very few words to add. It seems to me that the construction which ought to be given to ss. 6 and 12 of

(1) L. R. 4 H. L. 171.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Cozens-Hardy L.J.

the Waterworks Clauses Act, 1847, is reasonably plain, unless we are prevented from putting that construction upon them by the view taken by the House of Lords in *Hammersmith and City Ry. Co.* v. *Brand* (1) as to the effect of sections in the Railways Clauses Consolidation Act, 1845, which are somewhat similar to, but in important respects different from, those of the Waterworks Clauses Act, 1847. In that case the House of Lords appear to have regarded the "railway," the "construction" of which was referred to in the Railways Clauses Consolidation Act, 1845, as a causeway or embankment with rails laid upon it, and nothing more, a thing which was made once for all, although special power was given to the company by s. 86 of the Act to use locomotive engines and carriages upon it when made. I really fail to see any close analogy for the present purpose between a water undertaking and a railway. I think that a fair comparison of the sections, which were gone through by the Master of the Rolls, bears out the view which he has taken. It seems to me reasonably plain, whether one looks at the special Act or the general provisions of the Waterworks Clauses Act, that where "waterworks" are spoken of, that expression means, not only the mere structure, consisting of the reservoir, pumping station, &c., but something which is to be supplied with water from time to time, for which purpose water is from time to time to be abstracted from appropriate adjacent sources of supply. When one compares the words of s. 6 of the Waterworks Clauses Act, 1847, with the words of s. 6 of the Railways Clauses Consolidation Act, 1845, one finds in the former one word which to my mind is very emphatic in relation to the question raised in this case. Whereas the Railways Clauses Consolidation Act, 1845, s. 6, speaks only of "the construction of the railway," we find in the Waterworks Clauses Act, 1847, s. 6, the words "for the purpose of constructing or supplying waterworks." I think that in that expression the two words "constructing" and "supplying" are contrasted, and do not mean the same thing. I do not think that the word "supplying" refers to the purchasing of an existing water undertaking by the undertakers, for in that case it seems somewhat difficult to see how the occasion for compensation would arise.

(1) L. R. 4 H. L. 171.

I think that the words include both the constructing of the requisite works and appliances for taking, storing, and distributing the water, and also the subsequent supply of water necessary really to constitute them waterworks. That view is reinforced by the subsequent portion of the section, which speaks of lands or streams "injuriously affected by the construction or maintenance of the works thereby authorized," where the word "maintenance" appears to me to be contrasted with mere construction. I cannot myself give any other meaning to the words "supplying" and "maintenance" than that they apply to the operations which the undertakers were authorized to carry out in the way of conducting water by means of a well and pumping station through pipes into the reservoir which they were to make, in order that the works they were to construct might be waterworks in the full sense of the term. I do not think I should be justified in making a detailed comparison of the language of s. 12 of the Waterworks Clauses Act, 1847, and that of s. 16 of the Railways Clauses Consolidation Act, 1845. The language of the former section seems to me strongly to confirm the view which I have taken of s. 6, for it appears clearly to contemplate matters subsequent to the original construction of the works.

FARWELL L.J. I agree. It must be remembered that the case of *Hammersmith and City Ry. Co.* v. *Brand* (1) determined no question of principle. It dealt merely with the construction of a particular Act, which is not the Act with which we are dealing. Moreover, the Act upon which that decision turned dealt with a subject-matter so different from that with which the Act now in question deals, that it is obvious that the construction of the one statute can be little or no guide to the construction of the other. The case of *Hammersmith and City Ry. Co.* v. *Brand* (1) turned on the distinction between the construction of a railroad and the user of it after it was made by running locomotives and carriages upon it. I see no analogy for the present purpose between the case of a railway and that of waterworks, such as those in question, consisting of a well and pumping station by which water is obtained, a reservoir in which it is

(1) L. R. 4 H. L. 171.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Farwell L.J.

stored, and pipes by which it is carried to and from that reservoir. We have to deal with a section which speaks of "constructing and supplying waterworks," and the injurious affection of lands by "the construction or maintenance of the works thereby authorized." I ask myself, How are such waterworks constructed? I should say, not by merely making a well and pumping station and reservoir, but also by filling the reservoir. How are such waterworks maintained? I should say, by keeping them supplied with water. The use of them is by supplying the public with water by means of them. The construction and maintenance of them is by first constructing the reservoir and other works and filling the reservoir, and then keeping the reservoir full of water from time to time by means of the well and pumping station and the pipes which carry the water to the reservoir. How this Court can be bound by the decision of the House of Lords on sections relating to so different a subject-matter, and of which the words were so different from those of the sections which we have to construe, I fail to understand; and all the more so because there was so wide a divergence of judicial opinion in that case. The words of s. 6 of the Waterworks Clauses Act, 1847, are in my opinion so clear that one cannot give to the prefatory words which form the heading of that section the effect which the majority in the House of Lords gave to similar words in the Railways Clauses Consolidation Act, 1845, without striking words out of the portions of the section which immediately follow, and in which the word "supplying" is contrasted with the word "constructing" and the word "maintenance" with the word "construction." The correct view of prefatory words of this kind is expressed in Maxwell on the Interpretation of Statutes, 4th ed. p. 75: "The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention. The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections." Taking the doctrine so expressed as the guide in such a case, I cannot read prefatory words of this kind so as to strike out plain words, but only for the purpose of explaining doubtful expressions in the body of a section. In the

present case there is, I think, no ambiguity in the provisions of s. 6 of the Waterworks Clauses Acts, 1847. I should be content to rest my decision on that section. With regard to s. 12 of that Act I do not desire to add anything to what the other members of the Court have said.

C. A. 1906

FLETCHER v. BIRKENHEAD CORPORATION.

Appeal dismissed.

Solicitors for plaintiff: *Maude & Tunnicliffe, for J. F. Harrison & Burton, Liverpool.*

Solicitors for defendants: *F. Venn & Co., for A. Gill, Birkenhead.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1906 *Dec.* 12.

DARLINGTON *v.* ROSCOE & SONS.

Employer and Workman—Workmen's Compensation—Dependant of deceased Workman—Claim of Compensation by Dependant—Death of sole Dependant before Award — Legal personal Representative of deceased Dependant—Survival of Right to Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1; *s.* 7; *First Schedule*, *s.* 1 (*a*).

Where the sole dependant of a deceased workman, whose death was caused by an accident arising out of and in the course of his employment, made a claim against his employers for compensation under the Workmen's Compensation Act, 1897, but died before any award was made in respect of that claim:—

Held, that the right to compensation survived, and passed to the legal personal representative of the deceased dependant.

APPEAL against an award of compensation under the Workmen's Compensation Act, 1897, by the judge of the Lancashire County Court.

A workman in the employ of the appellants was injured by an accident arising out of and in the course of his employment. The appellants made him weekly payments for some time by way of compensation, but on November 19, 1905, he died of his injuries. He left as his sole dependant a widow, who had been wholly dependent on his earnings. The widow, on December 4, 1905, made a claim for compensation against the appellants in accordance with s. 2 of the Workmen's Compensation Act, 1897.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

On December 22 she died, and her daughter, the respondent, having taken out letters of administration, took proceedings in the county court for arbitration upon the claim on March 29. When the case came on for hearing, it was contended for the appellants that the right of the widow to compensation did not survive to her personal representative, but the county court judge held otherwise, and made an award in favour of the respondent for an amount of compensation calculated in accordance with the Workmen's Compensation Act, 1897, First Schedule, s. 1 (*a*).

Langdon, K.C., and *W. Greaves Lord*, for the appellants. The question is whether the right given by the Workmen's Compensation Act, 1897, to a dependant of a deceased workman is transmissible to the legal personal representative of the dependant. The principle expressed in the maxim "Actio personalis moritur cum persona" applies to this case. The rule of the common law with regard to rights of action for personal wrongs independent of contract is that they do not survive the death of the person wronged, though an exception was made to that rule by statute where the injury was to the estate of the person wronged. The distinction, therefore, at common law is between rights of action for injuries to proprietary rights and rights of action for injuries of a personal nature, as in the case of assault, libel or slander, or breach of promise of marriage. The right to compensation under the Workmen's Compensation Act, 1897, is analogous to the latter class. The Fatal Accidents Act, 1846, extended the liability for negligence where death has resulted from it, by providing that the legal personal representative of the deceased may bring an action for the benefit of certain specified relatives of the deceased. The provision for dependants of the deceased workman made by the Workmen's Compensation Act, 1897, is analogous to the provision made for the benefit of relatives of a deceased person by the Fatal Accidents Act, 1846. Under that Act, clearly, if the deceased left one such relative, who died before any action brought, the benefit of the Act would not survive in favour of the legal personal representative of that relative. It is true that the right to compensation under the Workmen's Compensation Act, 1897, does not depend upon any

tort committed by the employer, but the scope and machinery of the Act shew that the intention was to give, not a proprietary right, but personal compensation to the dependant, while alive, for the loss of the person on whom he or she was dependent: see, for instance, First Schedule, s. 6, which provides that the sum allotted as compensation to a dependant may be invested or otherwise applied for his benefit. Putting aside mere differences of detail and machinery, such as that the proceedings are not technically by action under the Workmen's Compensation Act, but by arbitration, and that, for the safeguarding of the employers, who are being made liable independently of any default on their part, a limit to the amount recoverable is fixed by the First Schedule, s. 1 (*a*), the nature of the right given by the Workmen's Compensation Act, 1897, is similar to that given by the Fatal Accidents Act, 1846. Upon the terms of the Act itself it would appear that the right given by it to the dependants is of a purely personal, not a proprietary, nature. Sect. 7 of the Act provides that "Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom compensation is payable." So that the legal personal representative of the workman is expressly mentioned, but there is no mention of the legal personal representative of the dependants. Similarly the First Schedule, s. 4, provides that "the payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due." These latter words refer to the medical and funeral expenses mentioned in the First Schedule, s. 1 (*a*) (iii.). The appellants admit that they are liable for these latter expenses to the extent of the sum fixed by the statute, namely, 10*l*. The Irish case *In re O'Donovan and Cameron, Swan & Co.* (1) is a strong authority in favour of the appellants. It is true that in that case the dependant had not made a claim in accordance with s. 2 before her death, and the Court no doubt to a great extent based their judgment on that fact; but it is

(1) [1901] 2 I. R. 633.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

submitted that logically that can make no difference. If the right to compensation is really in the nature of a proprietary right, accruing at the death of the deceased workman, then it is difficult to see why the legal representative of the dependant cannot make the claim; whereas, if it is only in the nature of a purely personal right, it is difficult to see why the mere making of the claim in the lifetime of the dependant should cause the right to survive. The observations of FitzGibbon L.J. in that case are very strong to shew that there was no proprietary vested right in the dependant at the time of death. [They also cited *Powell* v. *Main Colliery Co.* (1); *Finlay* v. *Chirney* (2); *In re Duncan* (3); *Twycross* v. *Grant* (4); *Bowker* v. *Evans* (5); *Story* v. *Sheard.* (6)]

J. R. Atkin, K.C., and *Adshead Elliott*, for the respondent. Upon the death of the deceased workman, the dependant becomes entitled, subject to the performance of the conditions precedent mentioned in s. 2, namely, that a notice of the accident should be given, and a claim made in accordance with the provisions of that section, to a definite sum of money by way of compensation, ascertained as provided by the First Schedule, s. 1 (*a*). The doctrine "Actio personalis moritur cum persona" has been held to apply only to actions of tort. Under the Workmen's Compensation Act, 1897, there is no action, and the right to compensation is not founded on any tort on the part of the employer. In the case of an action of tort the claim is for an unascertained sum by way of damages. There is nothing in the nature of a proprietary right before action. In the case of the Workmen's Compensation Act, 1897, there is a statutory duty imposed on the employers in certain events to pay a definite sum ascertainable by means of the data given by the statute. In the Irish case of *In re O'Donovan and Cameron, Swan & Co.* (7) the decision turned entirely upon the fact that the dependant there had made no claim in her lifetime, and therefore, whether the decision be right or wrong, it is no authority

(1) [1900] A. C. 366.
(2) (1888) 20 Q. B. D. 494, at pp. 502, 504.
(3) [1899] 1 Ch. 387.
(4) (1878) 4 C. P. D. 40.
(5) (1885) 15 Q. B. D. 565.
(6) [1892] 2 Q. B. 515.
(7) [1901] 2 I. R. 633.

for the present case. *Peebles* v. *Oswaldtwistle Urban District Council* (1) is a distinct authority for the proposition that, when a statute casts a duty on one person towards another, the right of action for breach of that duty does not die with the person. It would be straining the words to infer from the express mention of the legal personal representative of a deceased workman in s. 7 of the Act that such a claim as this cannot be maintained by the legal personal representative of a dependant; and, as regards any difficulty of procedure, that is met by r. 64 of the Workmen's Compensation Rules, 1898, which, in cases not otherwise provided for, imports the county court procedure. Most serious hardship would result to dependants of deceased workmen, if the contention of the appellants were correct, for in the interval between the death of the deceased workman and the award of compensation, which may be of considerable duration, their right would be only contingent and uncertain, as being liable to be defeated by death before the award, and they would then have no means of procuring credit. If the appellants' view be correct, in the case which has occurred there would be no machinery by which the medical or burial expenses of the deceased workman could be recovered.

Langdon, K.C., for the appellants, in reply.

COLLINS M.R. This is an appeal from the decision of a county court judge awarding compensation under the Workmen's Compensation Act, 1897, to the respondent. The case arises in the following manner. A workman in the employ of the appellants received injuries from an accident arising out of and in the course of his employment. He lived for some time afterwards, and, up to the time of his death, the appellants made him weekly allowances, but ultimately he died from the effects of the accident. He left as his sole dependant a widow, who was at the time of his death wholly dependent upon his earnings. She made a claim for compensation against his employers, but before the case came on for hearing she died. Her daughter, having taken out letters of administration, took proceedings in the county court; and, in the result, the county court judge,

(1) [1896] 2 Q. B. 159.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

Collins M.R.

having come to the conclusion that the widow was the sole dependant and was wholly dependent on the deceased workman, and finding that a claim for compensation had been made by her in her lifetime, made an award in favour of the administratrix for the balance, after deducting the amount of the weekly payments made to the deceased workman, of the quantified sum, which by the Act is payable in the case of a person wholly dependent on a deceased workman. Against that award the present appeal is brought. I have come to the conclusion that the decision of the county court judge was right, and that the appeal fails.

The main ground upon which the counsel for the appellants relied was that the maxim "Actio personalis moritur cum persona" applied, and therefore, as the proceedings were carried on by, and the award was made in favour of, the legal personal representative of the widow, the award was bad. In support of that view the Irish case of *In re O'Donovan and Cameron, Swan & Co.* (1) was vouched.

Before dealing with that case, however, I will refer to the Workmen's Compensation Act, 1897, s. 1, and the First Schedule of that Act, s. 1 (*a*), upon which the question mainly turns. [The Master of the Rolls here read the sections.] It appears to me that these enactments give to the person wholly dependent on the deceased workman a statutory right to a quantified sum by way of compensation for the death of the workman. There is no action at all, nor is it a question of any wrong done by the employer, for the accident may not have happened through any negligence of his, or for which he was responsible. The statute confers upon the dependant, under the given conditions, a right to be paid by the employer a measured sum of money, the amount of which is quite irrespective of any probabilities as to duration of life or other such considerations, which might involve the making of elaborate calculations. The Legislature appear to have intended to simplify matters, so as to avoid such considerations, by giving a fixed sum. I make this observation in answer to a suggestion of the appellants' counsel as to the hardship imposed on the employers by their having to pay, in the case of a person who survived so short a time, a sum which must be assumed to have

(1) [1901] 2 I. R. 633.

been fixed with reference to a longer expectation of life. I think that it was probably in order to get rid of all such questions that the Legislature provided as they did for a lump sum to be ascertained by reference to the deceased workman's earnings during a certain period. It appears to me that a statutory right to this ascertained sum accrued to the widow in her lifetime, and passed to the respondent as her legal personal representative.

I now come to the Irish case *In re O'Donovan and Cameron, Swan & Co.* (1) That case is not an authority for the present case. The main ground of the decision there was that there was no ascertained right to compensation in the dependant at the time of her death, because no claim for compensation had been made by her, giving to the tribunal jurisdiction to ascertain the amount due; and the Court held that such a claim was a condition precedent to a right enforceable by proceedings in the county court, and, as the dependant had died without making such a claim, that condition could not be fulfilled. That was the only point decided, and that distinguishes the case from the one with which we are dealing; for here a claim for compensation was made before the widow died. On going through the judgments it will be seen that they are all based upon the cardinal point to which I have alluded. There are, it is true, some observations by FitzGibbon L.J. (all of whose observations are entitled to the highest respect), which were said to involve the proposition contended for by the appellants, which was that the legal personal representative of a deceased dependant could not put in suit a claim of this kind, there being no reference in the definition of a "workman" in s. 7 of the Act, or in the First Schedule, s. 4, to the legal personal representative of a dependant, whereas the legal personal representative of a deceased workman is expressly mentioned. There are, no doubt, some observations in the judgment of the learned Lord Justice which may seem to countenance that view; but I hardly think that he meant definitely to commit himself to it, because he seems in one passage of his judgment to suggest that, but for the difficulty arising from the fact of no claim having been made

(1) [1901] 2 I. R. 633.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

Collins M.R.

in the dependant's lifetime, the award of compensation might have been supported, which is certainly to the contrary of the proposition suggested. He said (1): "I say nothing as to a difficult question which may arise as to the effect of the death of a person who has commenced a proceeding under the Act, but who dies before an award has been made. If an injured workman, for example, served notice of an injury and a claim for arbitration, and commenced proceedings under the Act, and if during the course of those proceedings, which might last a considerable time, the workman died, I should find great difficulty in saying that his death would carry with it the loss of the subsistence money, to which, had he lived till a decree was pronounced, he would have been entitled. But the difficulties in the way of holding that a right of action actually sued upon must die with the person who sues do not arise in the present case, for here no proceeding was taken by anyone named as a possible claimant in the Act." He was there dealing with a claim prosecuted by a legal personal representative of a claimant, and suggests that it might survive the death of the claimant. I think that this passage must be borne in mind in considering the effect of the passage on the next page to which I have alluded. I do not think that the judgment in the case is an authority to shew that, where a claim for compensation has been made by the dependant in her lifetime, her right will not survive to her personal representative. There is no countenance for such a suggestion in the judgments of the other members of the Court. Walker L.J., for instance, says: "The notice of accident was served by the mother of Patrick Calnan, not by the personal representative of the deceased claiming on her behalf as a dependant. But she took no further step, and did not institute proceedings under the Act. On March 22 there was no dependant, and no 'actio' to live or die. On this ground alone I base my decision. I say nothing as to whether, if the mother had commenced proceedings, or if the personal representative had commenced proceedings on her behalf in her lifetime, such proceedings would have died with her." The ground so stated is really the basis of the decision of the Court.

(1) [1901] 2 I. R. 637.

I wish to say a word or two with regard to the effect of the maxim "Actio personalis moritur cum persona" in this case, on the assumption that the claim to compensation is to be regarded as analogous to an action. I think that there is express authority that, even so, the right would survive to the legal personal representative, in the case of *Peebles* v. *Oswaldtwistle Urban District Council.* (1) There an action was commenced by a manufacturer for a mandamus to compel the defendants under the Public Health Act, 1875, s. 15, and the Rivers Pollution Prevention Act, 1876, s. 7, to make a sewer to enable the plaintiff to dispose of the liquids proceeding from his factory. The plaintiff died, and his executors applied to be substituted as plaintiffs. It was held that, as the alleged cause of action arose out of a statutory duty to the deceased, it survived to his executors. Here a statutory duty, not to do something, but to pay a sum of money, existed for the benefit of the dependant when she died, and that case seems to me a distinct authority that the right to performance of that duty survived to her legal personal representative. Further, it was pointed out that the omission of any mention of the legal personal representative of a dependant in s. 7, the definition section, has not the effect of barring further proceedings on the claim by such legal personal representative, for there is an express provision, if one be needed, in r. 64 of the Workmen's Compensation Rules, 1898, which provides that "where any matter or thing is not specially provided for under these rules, the same procedure shall be followed, and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act." Therefore, unless from the omission of any reference to the legal personal representative of a dependant there can be inferred a positive inhibition of any further claim of compensation after the death of the dependant, it is a mere case of an omission in the statute as to machinery of procedure, which is made good by the statutory rules. It has been pointed out that the statute contains no mention of the legal personal representative of a deceased doctor or undertaker entitled in respect of medical or funeral

(1) [1896] 2 Q. B. 159.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

expenses, but it cannot have been intended to inhibit a claim in respect of such expenses by the legal personal representative. I do not think that there is any evidence in the statute of any intention to inhibit such a claim as that in the present case.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons. One must bear in mind, in approaching this question, that the proceedings under the Workmen's Compensation Act, 1897, are not based upon a tort, or any misconduct on the part of the employer whom it is sought to make liable for compensation. By s. 1, sub-s. 1, the employer is, in respect of any personal injury caused to the workman by accident arising out of and in the course of his employment, liable to pay compensation in accordance with the First Schedule to the Act. By the First Schedule, s. 1, "The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l.*, whichever of those sums is the larger, but not exceeding in any case 300*l.*"; and then follows a provision for calculating the amount in cases in which the period of the workman's employment has been less than three years. So that the right is not to damages, the amount of which is left at large, but to a definite sum to be ascertained in accordance with the Act. This compensation is given "to dependants wholly dependent upon his earnings at the time of his death." That is the critical period. It is not confined to such dependants as may exist at the date of the commencement of the proceedings in the county court, still less at the date of the award. In short, there was a statutory obligation on the part of the employers in this case to pay in the event which happened a definite sum to the widow, as being the sole dependant of the deceased workman. She commenced proceedings by making a claim, but died before any award was made. Why had she not a vested right to compensation, which passed to her legal personal representative?

No principle can really be suggested in support of the appellants' contention that she had not such a right, and there is, it seems to me, authority against that contention. The case of *Peebles* v. *Oswaldtwistle Urban District Council* (1) is, I think, an authority that, where a statutory right is conferred on a person as in the present case, that right is one which passes to his legal personal representative, and can be enforced by him. Looking at this case on the broader ground of what may be presumed to have been the intention of the Legislature, I am much impressed with the extreme hardship which might be occasioned, if the view put forward by the appellants were correct, and the importance in such a case of giving to a person like the widow, wholly dependent on the deceased workman, a definite vested interest upon the strength of which she could raise money or obtain credit.

We have been pressed with the decision of the Irish Court of Appeal in the case of *In re O'Donovan and Cameron, Swan & Co.* (2) The Master of the Rolls has pointed out the difference between that case and the present, and I will only add that it seems to me that all the members of the Court in that case deliberately left open the question with which we now have to deal. There no claim for compensation had been made by the dependant before her death, whereas here such a claim was made. Lord Ashbourne C. in that case said: "But I say nothing as to what the rights of the parties would have been, had the deceased's mother died after the institution of the proceedings." Walker L.J. also expressly left the question open; and Holmes L.J. said: "I leave open the effect of the death of the dependant after claim and before award. Whether such an event would put an end to the claim altogether, or whether it could be revived for the benefit of the deceased, must be decided when the case arises." Under these circumstances I do not find myself at all hampered by the decision in that case, but feel fully at liberty to decide the present case according to what seems to me to be the plain meaning of the Act. If the facts of this case had been identical with those of the Irish case, speaking with the greatest respect for the Irish Court, and the utmost desire that,

(1) [1896] 2 Q. B. 159. (2) [1901] 2 I. R. 633.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

so far as possible, the decisions on the Act in this country and in Ireland should be consistent, I must say that, so far as I am concerned, I should have desired to take time to consider whether that decision was correct.

FARWELL L.J. In my opinion, the maxim "Actio personalis moritur cum persona" has no application to the present case. The respondent's claim is not based on any tort committed by the appellants, but seeks to compel the performance of a newly imposed statutory duty—a duty which is wholly independent of any wrong-doing by the party to be charged, but is made by statute part of every contract of employment to which the Act applies. If it must be either tort or contract (as Pollock B., in *Story* v. *Sheard* (1), would seem to suggest), it is certainly contract, the provision of the statute being part of the contract, just as the "custom of the country," which is local law, is part of a contract of tenancy which does not expressly exclude it. But I prefer to say that it is neither tort nor contract, but a statutory duty; and to such a duty this Court has held that the maxim in question has no application: see *Peebles* v. *Oswaldtwistle Urban District Council.* (2)

Further, the respondent's claim is not put forward in any action. It is said that the Workmen's Compensation Act, 1897, is analogous to the Fatal Accidents Act, 1846; but it is in truth its complete antithesis. The Act of 1846 proceeded by extending "actions" for "damages" for a wrongful act, neglect, or default, to cases where death had been caused thereby; the Act of 1897 proceeds by way of "arbitration" and gives "compensation," expressly distinguishing the proceedings under it from actions for damages: see, for instance, s. 1, sub-s. 4, and s. 6. The difference between the two Acts in this respect is made very clear by what was said by Lord Halsbury L.C. and Lord Robertson in *Powell* v. *Main Colliery Co.* (3) Lord Halsbury said: "It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language, and the mode in which the statute has

(1) [1892] 2 Q. B. 515. (2) [1896] 2 Q. B. 159.
(3) [1900] A. C. 366, at pp. 371, 381.

been enacted, that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that a man who was injured should be able to go himself, and say, 'I claim so much,' and that then he should go to the county court judge and say, 'Now please to hear this case, because my employer will not give me what I have claimed.' It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent, and had sufficient knowledge to say what it meant. Why is it that there is no suggestion here of 'plaint,' 'suit,' 'writ,' 'bill,' or any other proceeding in the form of claim, such as is recognized as a statement of claim? Nothing of the sort is to be found in the whole of the statute; and, even as to that which is now pointed out in the pressure of the argument by the learned counsel on the other side, namely, the application to a county court judge for a hearing, what is the meaning of the word 'application'? Are the parties at issue or not? Has any litigation arisen? Is there a 'dispute' in the language of the statute, which has commenced? If so, there is no technical phraseology by which the initiation of that dispute is pointed to, and it appears to me to be exactly in accordance with what I have suggested to be the real meaning of the statute, that, when once the claim for compensation has been made, and made upon the person who is alleged to be liable in respect of it, then the matter is either by agreement or by the operation of the statute itself remitted to the arbitrator." Lord Robertson said: "The proceedings contemplated by the Act of 1897 for the settlement of claims are not primarily judicial proceedings; and the error of the respondents arises from overlooking this distinctive characteristic of the Act."

It is said that, upon the true construction of the Act, there is no liability imposed upon the appellants in this case. Sect. 1 of the Act imposes, in respect of personal injury to workmen in cases to which the Act applies, a general liability to pay

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

Farwell L.J.

compensation in accordance with the First Schedule of the Act. Sect. 2 provides that proceedings for the recovery of such compensation shall not be maintainable unless notice of the accident has been given as prescribed by the section, and unless a claim for compensation has been made within six months from the occurrence of the accident, or, in the case of death, from the time of the death. Sect. 7 defines the term "workman," and provides that "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom compensation is payable;" and that "'dependants' means (*a*) in England and Ireland such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." The First Schedule, s. 1, provides that "the amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l.*, whichever of those sums is the larger, but not exceeding in any case 300*l.*, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer; (ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and (iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding 10*l.*" This section makes compensation payable in three alternative events;

and, at any rate where (as here) notice of the accident has been given and a claim has been made as provided by s. 2, the liability of the employer becomes absolute, although the measure of it depends on which of the three events mentioned in the First Schedule, s. 1 (*a*), existed. Then s. 4 of the schedule provides that "the payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act." There is nothing here to qualify the antecedent liability already imposed. The intention obviously is that the money shall be paid to the legal personal representative, if any, to be distributed by him in accordance with the rights of the parties under the Act, but, if there be no legal personal representative, then to allow the dependants, for whose benefit the provision is intended, or, if there be none such, the doctor and undertaker, to receive it direct, without the necessity of taking out administration; but there is nothing to impose any condition of surviving the award on the dependants, nor is there any reason for so doing. The sum payable is a lump sum, not one payable by weekly or monthly instalments, or measured by the expectation of life of the dependants. To impose such a condition would defeat the Act in one respect at least, for the sum awarded is paid to the legal personal representative for the purpose of paying the doctor and undertaker, if there are no dependants living at the death; but, if the appellants are right, the legal personal representative cannot recover for the dependants, because the widow died before the award was made, nor for the doctor and undertaker, because the widow was living at the death of the deceased workman.

The Irish case *In re O'Donovan and Cameron, Swan & Co.* (1) is not the same as the present, because in that case no claim for compensation, as required by s. 2, was made during the dependant's lifetime, and it was held that such a claim could not be

(1) [1901] 2 I. R. 633.

C. A. 1906

DARLINGTON v. ROSCOE & SONS.

Farwell L.J.

made by the dependant's legal personal representative. There is, however, one passage in the judgment of FitzGibbon L.J., from whose judgments I have so often derived pleasure and assistance, upon which I should like to say a few words by way of comment. He said: "The right of action is not assets of the workman, for, though the Act prescribes that his representative may take the proceedings, he can do so only as a trustee for dependants, or to recover expenses actually incurred." With all respect, I doubt whether it is quite correct to say that the right to compensation could in no case be spoken of as assets of the workman. The claims of the doctor and the undertaker are debts of the workman, which would be payable by his legal personal representative out of his estate. If there is a legal personal representative of the workman, he is the person to receive the compensation payable; and the right to compensation might, as it seems to me, correctly be spoken of as assets of the workman in his hands for payment of those claims under the conditions and to the amount mentioned in the First Schedule of the Act, s. 1 (*a*) (iii.). The Lord Justice then proceeded to say: "It is equally clear that, similarly, no such vested proprietary right of action vests in the workman's dependants at his death. At best a right of action arises for their benefit, which they may or may not exercise. If they do exercise it, and make their 'claim,' it may be difficult to hold that the claim will not merely abate, but will perish, by the death of the claimant before the compensation has been awarded. But if they do not exercise it, if they make no claim, if they institute no proceeding, the action cannot be initiated, nor can the claim be for the first time made by the personal representative of the deceased workman on behalf of dependants who were dead before the representation was raised." With regard to this passage, I venture respectfully to say that the right to compensation is not a right of action, as has been shewn by the decision in the House of Lords to which I have referred, and it seems to me probable that all the Lord Justice meant by saying that the right of the dependant was not a vested proprietary right at the time of the deceased workman's death was that it was, as the Court held, a right

contingent upon her making a claim in accordance with s. 2 of the Act.

Appeal dismissed.

Solicitors for appellants: *Peace & Darlington, Liverpool.*

Solicitors for respondent: *Chester, Broome & Griffithes, for Fielding & Fernihough, Bolton.*

E. L.

EMANUEL AND OTHERS *v.* SYMON.

1906 *Nov.* 19, 26.

Foreign Judgment—Partnership — Colonial Firm — Real Estate — Partner resident in England—Agreement to submit to Jurisdiction.

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into a partnership for the working of a gold mine, owned by the partnership, in that Colony. In 1899 the defendant left Western Australia permanently and came to reside in England. In 1901 the plaintiffs, being the partners other than the defendant, commenced an action in the Supreme Court of Western Australia against the defendant claiming a decree for the dissolution of the partnership, the sale of the mine, and the taking of partnership accounts. The writ was served on the defendant in England, but he did not enter an appearance or take any step to defend the action. The Court decreed the dissolution of the partnership and the sale of the mine, and on taking the account a sum was certified to be due from the partnership. The plaintiffs paid the sum, and sought to recover the share due from the defendant in an action on the decree and certificate:—

Held, that the defendant, by entering into a partnership in Western Australia relating to real estate in the Colony, had by implication agreed to submit to the jurisdiction of the Courts of Western Australia as to disputes arising during the continuance and on the termination of the partnership, and that the decree was, therefore, binding on him.

Copin v. *Adamson*, (1874) L. R. 9 Ex. 345; 1 Ex. D. 17, applied.

Quære, whether the assignment by a partner in a firm, consisting of more than two members, of his share in it to another partner operates as a dissolution of the partnership.

ACTION in the commercial list tried by Channell J. without a jury.

The plaintiffs sought to recover from the defendant the sum of 1281*l.* 4*s.* 11*d.* due under a decree made in an action against him in the Supreme Court of Western Australia. The facts were as follows: In 1895 the defendant, who was then residing

1906

EMANUEL v. SYMON.

and carrying on business in Western Australia, agreed to enter into partnership with five other persons, whose interests were now represented by the plaintiffs, for the purpose of working and developing a gold mine in Western Australia owned by the partnership. The defendant subsequently gave up his business in Western Australia, and in 1899 left the Colony permanently and came to live in England. In 1899 two of the partners assigned their shares to a third partner who died in 1901, and the partnership, which had not been a success, was only continued after 1899 for the purpose of winding-up. In 1901 a writ was issued by the present plaintiffs, who were the two continuing partners who had not assigned, and the executors of the deceased partner, against the defendant in the Supreme Court of Western Australia claiming a dissolution of the partnership, a sale of the mine, accounts and inquiries, and other relief as in an ordinary partnership suit. The writ was served on the defendant in England on November 13, 1901, but he did not enter an appearance. He was, however, kept informed from time to time of the proceedings in the action. On July 25, 1902, the Supreme Court of Western Australia pronounced a decree for the dissolution of the partnership as from that date, for the sale of the mine, and for the usual accounts to be taken by the taxing officer. The sale was carried out and the accounts were taken, and the taxing officer duly issued his certificate shewing that the partnership had liabilities amounting to a certain sum. This sum was paid by the plaintiffs, and the defendant's share thereof was 1281*l.* 4*s.* 11*d.*

The defendant, by his points of defence, alleged that at all material times he was a British subject domiciled in England; that neither at the commencement of the action in Western Australia nor at any time during its continuance was he resident or domiciled in that Colony or subject to the jurisdiction of its Courts; that he did not appear to the writ in that action or agree to submit to the jurisdiction of the Court, and that the decree of the Court was not binding on him. The defendant also stated in his evidence that the partnership had been in fact dissolved in 1896, but the learned judge held on the evidence that this was not the case.

Holman Gregory, for the plaintiffs. First, the assignment by two of the partners of their shares in the partnership to another partner in 1899 did not operate to dissolve the partnership at that date: *Sturgeon* v. *Salmon* (1); Lindley on Partnership, 7th ed. p. 621; Pollock's Digest of the Law of Partnership, p. 80. The partnership, therefore, continued until the date from which the Court of Western Australia decreed dissolution. The defendant is bound by the judgment of that Court. The authorities shew that a person is bound by a judgment obtained against him in a foreign Court if he has agreed to submit himself to the jurisdiction of that Court: *Schibsby* v. *Westenholz* (2); *Rousillon* v. *Rousillon*. (3) The defendant, by entering into a contract of partnership with persons in Western Australia relating to a mine situate there, must be taken to have impliedly agreed that all questions between the partners relating to the partnership business should be determined in the Courts of that Colony. In *Copin* v. *Adamson* (4) the defendant had taken shares in a French company, and had thereby become subject to the statutes or articles of association of the company, which provided that disputes between the company and the shareholders should be tried in the French Courts, and the Court held that that shewed an agreement on the part of the defendant to submit to the jurisdiction of the French Courts. The fact that the agreement there was express, whereas here it is implied, makes no difference in principle.

McCall, K.C., and *A. W Groser*, for the defendant. The assignment by two of the partners of their shares in 1899 caused a dissolution of the partnership as from that date, and, that being so, it is clear that in 1901 the colonial Court had no jurisdiction over the defendant, as he was not then a subject of or resident in the Colony, and the partnership was non-existent: *Schibsby* v. *Westenholz*. (2) Assuming that the partnership continued after 1899, the defendant is nevertheless not liable on the colonial judgment. He never submitted to the jurisdiction of the Court. There is no case in which it has been held that by simply entering into a contract in a foreign

(1) (1906) 22 Times L. R. 584.
(2) (1870) L. R. 6 Q. B. 155.
(3) (1880) 14 Ch. D. 351, at p. 371.
(4) L. R. 9 Ex. 345; 1 Ex. D. 17.

1906

EMANUEL v. SYMON.

country a person agrees to submit to the jurisdiction of the Courts of that country, and no distinction can be drawn between a contract of partnership and any other contract. *Copin* v. *Adamson* (1) was a very different case from the present, for there the defendant had expressly agreed that the French Courts should adjudicate upon all disputes between the shareholders and the company. It would be carrying that decision very far to apply it to this case, where the agreement is silent on the point. The passage in the judgment of Fry J. in *Rousillon* v. *Rousillon* (2), on which the plaintiffs rely, only applies to an express contract, and it is to be observed that in that case, although the contract was made in France, the decision was that the judgment of the French Court could not be enforced in an English Court. It may be that the defendant could not have objected to the colonial Court making an order for the sale of the mine, but the jurisdiction of that Court over the defendant went no further than that. [They also cited *Turnbull* v. *Walker*. (3)]

Holman Gregory, in reply, referred to *Bank of Australasia* v. *Harding*. (4)

Cur. adv. vult.

Nov. 26. CHANNELL J. The main question which I have to decide in this case is whether the defendant is bound by the judgment obtained against him in the Supreme Court of Western Australia. [The learned judge stated the facts, and continued:—] The defendant stated in his evidence that the partnership was dissolved in 1896, and he stated in his re-examination that the other partners agreed then to take over the assets and liabilities of the partnership. I have already expressed my opinion that the defendant has not made out his case on this point, and that he continued to be a partner after 1896. It was next suggested that the partnership was dissolved in 1899. For reasons which will appear from my judgment it is unnecessary to decide whether that was so or not. The real question which I have to decide is whether the defendant is bound by the judgment of the colonial Court. Several authorities were cited during the

(1) L. R. 9 Ex. 345; 1 Ex. D. 17.
(2) 14 Ch. D. 351, at p. 371.
(3) (1892) 67 L. T. 767.
(4) (1850) 9 C. B. 661.

arguments, the first one being *Schibsby* v. *Westenholz* (1), which shews that in order to bind a defendant by a judgment given against him in a foreign Court in his absence he must in some way or other be brought within the jurisdiction of the Court in question, for foreign judgments are not enforced in this country through any principle of comity, but simply when the party sued has brought himself within the jurisdiction of the foreign Court. Another case referred to was *Copin* v. *Adamson* (2), where it was held that a person who took shares in a French company, the constitution of which expressly provided that all disputes arising during liquidation between shareholders should be decided in the French Courts, submitted himself to the jurisdiction of the French Courts, so far as questions between the company and the shareholders were concerned. The case is an instructive one, because there were demurrers, and the question arose on the replications of the plaintiff, by the first of which he relied on the fact that the defendant was a holder of shares in the French company and thereby became subject to the articles of association of the company, by which it was agreed that all disputes should be submitted to the jurisdiction of the French Courts; and by the second the plaintiff relied, not on any agreement by the defendant, but on the general law of France. The Court of Exchequer was unanimous in thinking that the facts alleged in the first replication brought the defendant within the jurisdiction of the French Courts, whereas the majority of the Court thought that the second replication was not good, and the decision is therefore an authority for saying that one important matter in determining the question is to consider whether there is any agreement by which the defendant has brought himself within the jurisdiction of the foreign Court. The question was further considered by Fry J. in *Rousillon* v. *Rousillon* (3), where, after discussing the cases, including *Copin* v. *Adamson* (2), he stated his conclusions as to the result of the authorities in these words: "The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the

(1) L. R. 6 Q. B. 155. (2) L. R. 9 Ex. 345; 1 Ex. D. 17.
(3) 14 Ch. D. at p. 371.

1906

EMANUEL v. SYMON.

Channell J.

action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared"—the present case does not fall within any of those classes, but the next passage possibly does apply to the present case—"where he has contracted to submit himself to the forum in which the judgment was obtained, and, possibly, if *Becquet* v. *MacCarthy* (1) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." In the present case the defendant became a member of a partnership which was to work, temporarily at any rate, a gold mine in Western Australia, and it seems to me quite clear that it must have been contemplated that all partnership matters should be dealt with in the Courts of Western Australia. I can see no real difference in principle, for the purpose which I am considering, between a partnership and a company; and, further, there is this important point to bear in mind, that this partnership related to the working of a mine, and a mine is of course real estate. It is clear to my mind that the matters dealt with in the action in Western Australia, the decree ordering a sale of the mine, the declaration as to the interest of the different partners in the proceeds of the sale, are all of them matters which must have been dealt with by the Courts of that country, and this case in my opinion comes entirely within the same principle as was applied in the case of a company in *Copin* v. *Adamson*. (2) The defendant, by joining this partnership for the working of the mine in Western Australia, must, I think, be taken to have contracted that all partnership disputes, if any, should be determined by the Courts of that country, and thereby subjected himself to the jurisdiction of those Courts, just as in *Copin* v. *Adamson* (2) it was held that a man who took shares in a French company and expressly agreed that disputes as to shares should be settled in the manner provided by the company's articles, that is, in the Courts of France, so subjected himself. If I am right in saying that the defendant by becoming a partner has submitted to the jurisdiction of the Courts of Western Australia as to disputes arising during the continuance

(1) (1831) 2 B. & Ad. 951. (2) L. R. 9 Ex. 345; 1 Ex. D. 17.

of the partnership, it follows, in my opinion, that he has also submitted to the jurisdiction in respect of questions arising on the termination of the partnership, at which time disputes are most likely to arise with regard to the winding-up, the sale of the partnership assets—in this case real property—and so on. This is the reason why, as I have already said, it is in my view immaterial to consider whether the partnership terminated in 1899 or was still subsisting at the date of the decree of the colonial Court for dissolution of the partnership. Whether the decision of that Court that the partnership continued after 1899 was right according to the law of this country (and, in the absence of proof to the contrary, the law there must be presumed to be the same as here) may be a matter of doubt, but if it be the fact that the defendant had submitted to the jurisdiction of the Court, he ought to have appeared in the suit and raised the question as to the date when the partnership terminated and any question as to the present plaintiffs being the proper parties. The question, however, is one of no practical importance, because the partnership did no business after 1899, and it was only continued after that date for the purpose of winding-up, and even after dissolution of partnership one partner has authority to bind another by acts done in connection with the winding-up. It is therefore unnecessary for me to decide whether the partnership was dissolved in 1899, but as the question has been raised I desire to say a few words upon it. It is a matter of considerable difficulty. The point arose in this case from the fact that in 1899 two of the partners assigned their shares in the partnership to a third partner, who died shortly afterwards. Whether the assignment of his share by one partner to another operates to dissolve the partnership may be said to be at the present time a matter of very considerable doubt. It is stated at p. 583 of the 5th edition of Lindley on Partnership, which was published before the Partnership Act, 1890, that in the case of a partnership at will the assignment by a member of an ordinary firm of his share in it operates as a dissolution of the partnership; but in the editions published since the Act the editors indicate that it is their opinion that the Act has made a difference in this respect,

1906

EMANUEL v. SYMON.

Channell J.

because the Act mentions certain specific cases in which a partnership is to be considered to be dissolved, and the assignment of partnership shares is not included amongst them. I was referred to a case of *Sturgeon* v. *Salmon* (1), in which it was suggested that the point had been decided by Ridley and Darling JJ. in the Divisional Court, but when that case is examined it will be found that the point was not decided, the decision of the Court having proceeded on the special terms of the particular agreement between the parties. There seems to be no real authority on the question where there are more than two partners, though where there are only two partners there is authority: *Heath* v. *Sansom* (2), which shews that an assignment by one partner of his share to the other does put an end to the partnership, as indeed must obviously be the case. Where there are more than two partners and there is an assignment from one to another so that no new partner is introduced, the question is so doubtful that I do not like to express an opinion on it. The Partnership Act, 1890, leaves the matter in doubt, because the Act provides by s. 46 that the rules of equity and common law applicable to partnership shall continue in force except in so far as they are inconsistent with the express provisions of the Act, and it is very arguable whether the addition of other causes of dissolution is inconsistent with a section which expresses certain causes.

The ground on which I decide this case in favour of the plaintiffs is that the Court of Western Australia had jurisdiction to bind the defendant by its judgment as to matters arising during the continuance of the partnership and also on its termination, and therefore it is not necessary, in order to make the judgment binding on the defendant, to shew that the partnership did continue down to the commencement of the suit.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Trinder, Capron & Co.*
Solicitor for defendant: *S. J. R. Stammers.*

(1) 22 Times L. R. 584. (2) (1832) 4 B. & Ad. 172.

F. O. R.

JOSEPH THORLEY, LIMITED *v.* ORCHIS STEAMSHIP COMPANY, LIMITED.

1906
Nov. 20, 21.

Ship—Bill of Lading—Effect of Deviation on Limitation of Liability.

The benefit of an exception clause in a bill of lading exempting the shipowner from liability for loss from any act, neglect, or default of (inter alia) the stevedores of the owners in discharging the ship, is lost if the ship has deviated from her contemplated voyage, even although the particular loss has been in no way caused by the deviation, but has been brought about entirely by the negligence of the stevedores at the port of discharge.

Balian v. *Joly, Victoria & Co.*, (1890) 6 Times L. R. 345, followed.

Action tried in the Commercial Court before Channell J. and a special jury.

The plaintiffs were manufacturers of food-stuffs for cattle, and were the indorsees of a bill of lading for 897 tons of locust beans which contained the following clauses: "Shipped in good order and condition" on, in and upon the steamship *Orchis*, "now lying in the port of Limassol and bound for London . . . . to be delivered in the like good order and condition at the aforesaid port of London (. . . . all accidents loss and damage whatsoever . . . . from any act neglect or default whatsoever of the pilot master officers engineers crew stevedores servants or agents of the owners in the management loading stowing discharging or navigation of the ship or otherwise (1), and the ship not being liable to make good loss arising from any of the causes above)."

It appeared that the *Orchis* when loaded with the beans proceeded from Limassol to a port in Asia Minor, and thence to a place in the north of Palestine, and thence to Malta and so to London. When the beans had been unloaded it was found that they had got mixed with a poisonous earth called terraumber, a large quantity of which had also been carried on the *Orchis* from Limassol to London, and the plaintiffs were therefore unable to make use of the beans. They brought the present action for damages for breach of contract and breach of duty in and about

(1) The word "excepted" was omitted from the bill of lading, presumably by inadvertence.

1906

JOSEPH THORLEY, LIMITED v. ORCHIS STEAMSHIP COMPANY, LIMITED.

the carriage of the beans. The defendants, in their defence, alleged that, if the beans were damaged by admixture with the terraumber, such admixture was solely caused by the act, neglect, or default of the master or stevedores in the loading, stowing, or discharging of the vessel, for which by the terms of the bill of lading the defendants were not liable. The plaintiffs, in their reply, alleged that, as the *Orchis*, which was described in the bill of lading as then lying in the port of Limassol and bound for London, had deviated from her voyage and gone to other ports wholly out of the course of her voyage, the defendants were not entitled to the protection of any of the exceptions from liability contained in the bill of lading.

The jury found that the terraumber and the locust beans were properly stowed and separated, and that the admixture was caused during discharge, and they estimated the damage at 240*l*.

Scrutton, K.C. (*Lewis Noad* with him), for the defendants. Judgment should be entered for the defendants on these findings. The exception clause in the bill of lading frees them from all liability for the act, neglect, or default of their stevedores, servants, or agents in discharging the cargo. The fact that the vessel deviated from her voyage is immaterial, since that deviation cannot have conduced to the mishap to the beans, as the jury have found that the admixture with the terraumber was caused during discharge. The shipowner is only liable in such a case where the loss is attributable to his wrongful act in deviating and happened while that wrongful act was in operation: *Davis* v. *Garrett*. (1) The expressions in the Court of Appeal in *Balian* v. *Joly, Victoria & Co.* (2) to the effect that the shipowners lose the benefit of the exception clause if there has been any deviation on the voyage are obiter, and cannot be supported.

Chaytor (*J. A. Hamilton, K.C.*, with him), for the plaintiffs. The case is governed by *Balian* v. *Joly, Victoria & Co.* (2) If there is any deviation the merchant is deprived of the benefit of his insurance, and therefore it has been rightly held that a deviation, whether it conduces to the loss or not, deprives the shipowner of the benefit of the exception clause in the bill of

(1) (1830) 6 Bing. 716. (2) 6 Times L. R. 345.

lading. [He also referred to *The Dunbeth* (1); *Behn* v. *Burness* (2); *Engman* v. *Palgrave, Brown & Son.* (3)]

CHANNELL J. I think I must follow the last case upon this point, which, although only in *The Times* Law Reports, seems to be quite clear and well reported. As we know, from being there, it would be reported by a barrister, and I think I must follow it. It is quite true that, in one sense, what the Court said there was unnecessary, because the facts were that the damage was caused during the deviation. But this is not a mere question of the judges going out of their way to say something that was unnecessary—they state the ground upon which they put their decision; and, therefore, I do not think I can treat what they say as obiter. It is a case in which they explained the principle, and in a way that governs this case.

At first I certainly was inclined to think that it was a mere technical point on which (assuming the law to be as stated in the last case in the Court of Appeal) one could hardly say that one's common sense went along with the law, as in my experience it generally does, when you know what the law is. I am not quite sure about that now that Mr. Chaytor has pointed out the effect upon the insurance, and that seems to me to be a practical point which rather indicates that there may be very good reason for the rule as laid down in the last case in the Court of Appeal, which I think I must follow.

Therefore, there will be judgment for the plaintiffs for 240*l.*, 200*l.* of which has been paid into Court.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) [1897] P. 133. (2) (1863) 3 B. & S. 751.
(3) (1898) 4 Com. Cas. 75.

A. P. P. K.

C. A.
1906
Nov. 30.

[IN THE COURT OF APPEAL.]

SPEYER BROTHERS, Appellants; THE COMMISSIONERS OF INLAND REVENUE, Respondents.

Revenue—Stamp—Treasury Note of Foreign Government—"Promissory Note"—"Marketable Security"—"Debenture"—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *ss.* 33, 82, 122.

A foreign Government issued a series of instruments, described as "gold coupon treasury notes," each of which contained a promise to pay the amount of the note in gold to the bearer at a certain date two years from the date of issue; attached to each note were coupons for the payment of the interest in gold, the interest being payable abroad, or at the option of the bearer in London. The notes were redeemable at par at any time before maturity at the option of the issuing Government upon their giving sixty days' notice of their intention to redeem; they gave no security to the holder beyond the promise to pay the face amount of the notes; and they were marketable, though not readily saleable, on the London Stock Exchange:—

Held, that the instruments were promissory notes within the meaning of s. 33 of the Stamp Act, 1891, but that they were also marketable securities within the meaning of s. 122, sub-s. 1, of the Act, and chargeable with stamp duty at the rate applicable to such securities.

Decision of Walton J., [1906] 1 K. B. 318, reversed.

Appeal from a decision of Walton J. upon a case stated by Commissioners of Inland Revenue, reported [1906] 1 K. B. 318.

The instrument upon which the question of the appropriate stamp duty arose was set out in the special case as follows:—

"United States of Mexico.

"Four and one-half per cent. Gold Coupon Treasury Note.

"No. 7781. "$1000.

"United States of Mexico acknowledge themselves indebted and promise to pay to bearer on the 1st day of June 1905 One thousand dollars ($1000) in gold coin of the United States of America and also to pay interest on said principal sum in like gold coin at the rate of Four and one-half per cent. (4½ per cent.) per annum from the 1st day of June 1903 semi-annually on the first days of December and June in each year upon surrender of the annexed coupons as they respectively mature. Both as to

principal and interest this Treasury Note shall be for ever exempt from any taxes or assessments which may at present exist or be hereafter imposed by the United States of Mexico. The principal and interest of this Treasury Note are payable in the City of New York at the office of Speyer & Co. or at the option of the holder in London England at the office of Speyer Brothers in sterling at the fixed rate of $4.85 to the pound sterling.

"This note is redeemable at par and accrued interest at the option of the United States of Mexico at any time before maturity on sixty days' notice to be given by publication in two newspapers of general circulation in said City of New York and in two newspapers of general circulation in said City of London; notice having been so given, interest on this Treasury Note shall cease on the day so designated for redemption.

"This note is issued in pursuance of the law of Congress of the 15th day of May 1903.

"*Form of Coupon.*

"UNITED STATES OF MEXICO.

"Four and one-half per cent. Gold Coupon Treasury Note.

"No. 7781.

"Coupon No. "$22.50

"On the First day of 19 unless the above mentioned Treasury Note shall be sooner redeemed and on the surrender of this coupon, United States of Mexico will pay to bearer in the City of New York, U.S.A., at the office of Speyer & Company Twenty-two dollars and fifty cents in gold coin of the United States of America or in London at the office of Speyer Brothers 4*l.* 12*s.* 9*d.* sterling being six months' interest then due on said Treasury Note."

The instrument was one of a series, and the coupons were attached to the principal documents, and all were signed by the accountant of the treasury and the treasurer-general of the nation.

The Commissioners, upon evidence before them, found as a fact that the instrument in question was capable of being sold on the London Stock Exchange and on other stock markets in

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

the United Kingdom. They were of opinion that it was a marketable security by a foreign State or Government within the meaning of s. 82, sub-s. 1 (*b*), of the Stamp Act, 1891, and should be assessed as a marketable security.

The appellants required that a case should be stated, and Walton J., upon further evidence called at the hearing of the case, found that the instrument was of such a description as to be capable of being dealt with and was marketable upon the Stock Exchange.

The learned judge, however, came to the conclusion that the instrument was a promissory note and was sufficiently stamped as such, and gave judgment accordingly. (1)

The respondents appealed.

Sir J. Lawson Walton, A.-G., and *Sir R. B. Finlay, K.C.* (with them *W. Finlay*), in support of the appeal. The learned judge was wrong in holding that this document was a promissory note. A promissory note involves a promise by some person or corporation amenable to process in these Courts, and it is at the least doubtful whether a sovereign State could be sued on such an instrument. Even if it is a promissory note within the definition in the Stamp Act, 1891, it is something more, for it contains an acknowledgment of indebtedness by the United States of Mexico; a note as to exemption from taxes; a clause as to repayment after notice; a reference to the law of Congress; and it has attached coupons for interest.

The authorities shew that a document may come within the definitions of two classes of instruments, and in such a case it is chargeable with stamp duty under that class to which the higher rate of duty is attached: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (2); *Brown, Shipley & Co.* v. *Inland Revenue Commissioners.* (3)

From this point of view this document may be chargeable as a debenture. All that is necessary in a debenture is that it should acknowledge a debt and purport to be security for its repayment: *Edmonds* v. *Blaina Furnaces Co.* (4)

(1) [1906] 1 K. B. 318.
(2) (1881) 7 Q. B. D. 165.
(3) [1895] 2 Q. B. 598.
(4) (1887) 36 Ch. D. 215.

It is not necessary to insist that the document is a debenture, for it certainly is a merchantable security to which a higher rate of duty is attached. Sect. 82 of the Stamp Act, 1891, expressly deals with marketable securities by and on behalf of any foreign State, and by sub-s. 1 (*b*) (iii.) the test of liability to stamp duty is that such a marketable security should be one "which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom." The interest in this case was payable in the United Kingdom, but that condition is no longer necessary, in cases of securities transferable by delivery, under s. 4 of the Finance Act, 1899. (1) Sect. 122 of the Act of 1891 defines "marketable security" as "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." All the requisites to bring this document within this definition, and to make it liable to duty under s. 82, are present. The decision in *National Telephone Co.* v. *Inland Revenue Commissioners* (2) shews that the word "security," as used in the Act, includes an instrument by which the obligation to pay is originally created. It has a wide meaning, and does not necessarily involve a charge on property. The instrument being a security, it has been established by evidence, and found by the learned judge, that it is capable of being sold on the Stock Exchange, and it has been assigned, transferred, or negotiated in the United Kingdom.

Danckwerts, K.C., and *Vaughan Hawkins*, contra. This document is a promissory note and nothing more, and its character is not altered because it is issued by a foreign State. The statements on its face, to which reference has been made to shew that it is more than a promissory note, have not that effect any more than the words "for value received" would affect the character

(1) 62 & 63 Vict. c. 9, s. 4: "(1.) There shall be charged on every marketable security made or issued by or on behalf of any foreign State or Government or foreign or colonial municipal body, corporation, or company, being a security transferable by delivery, which (*a*) is after the first day of August one thousand eight hundred and ninety-nine, assigned, transferred, or in any manner negotiated in the United Kingdom, ... a stamp duty of one shilling for every ten pounds, and also for any fractional part of ten pounds . . . . thereby secured."

(2) [1899] 1 Q. B. 250.

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

of a bill of exchange. The interest expressed to be payable on the face of the note does not make any difference in the stamp duty: *Pruessing* v. *Ing* (1); *Wills* v. *Noott.* (2) A document that is a promissory note, and nothing more, is chargeable only with stamp duty as a promissory note: *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners.* (3) In *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (4) the document, though in the form of a promissory note, contained a contract that the holder was to be entitled to the benefit of the security mentioned in it; and on this ground it was held in the Court of Appeal to be something more than a promissory note. Where, as in this case, no security is attached to or issued with such a document, it is chargeable only with a penny stamp: *Rothschild & Sons* v. *Inland Revenue Commissioners.* (5) No doubt the class included in the Stamp Act, 1891, under the heading "Bill of Exchange and Promissory Note" embraces documents outside the definitions in the Bills of Exchange Act, 1882, but the class is still that of commercial documents bearing the character of bills of exchange or promissory notes. Sect. 33, which defines a promissory note, contemplates a condition or contingency on its face, and the contingency of payment upon notice does not alter the character of this document.

If it is once established that the instrument is a promissory note it is chargeable only with the appropriate stamp duty, and there is no right of selection on the part of the Crown by which it can be transferred to and charged with duty in another class. Even if such a right exists the attempt to bring this promissory note within another class fails, and it is neither a debenture nor a marketable security.

In the schedule "debenture" is classed with mortgage, bond, covenant, and warrant of attorney, which are all technical terms. The expression ought not to be extended beyond the ordinary meaning attached to it, that is, a deed under the seal of a corporate body giving a charge over property as security for a loan. Even if a document not under seal may be treated as a debenture,

(1) (1821) 4 B. & A. 204.
(2) (1834) 4 Tyrw. 726.
(3) (1888) 21 Q. B. D. 352.
(4) [1895] 2 Q. B. 598.
(5) [1894] 2 Q. B. 142.

it must carry on its face some security. There is no security in this case other than, as in ordinary cases of promissory notes, the credit of the giver. In *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1) the document was on its face called a debenture, and this fact governed the judgment of the Court. It may be conceded that in some cases the term "security" includes an instrument that itself creates the obligation to pay; a promissory note may do that, but the sense in which the term is used in this Act is that by the instrument itself there is something hypothecated to meet the obligation created by it. The learned judge has found that these promissory notes are marketable because they are capable of being sold on the Stock Exchange. All sorts of things, a motor car, for instance, can be sold there, and are sold, but that does not make them marketable securities, because they have not the characteristics of securities; and the same thing applies to these instruments, which are not even personal undertakings, for the signatories are not liable on them. They are merely undertakings to pay unsupported by anything but the credit attached to the promise of the contracting State.

Sir R. B. Finlay, K.C., in reply. It is clear that a promissory note is regarded in the Stamp Act, 1891, as a security, for in the schedule under the heading "Bill of Exchange and Promissory Note," there are exemptions, one of which is "(11.) Coupon or warrant for interest attached to and issued with any security." Unless the promissory note to which a coupon for interest is attached is a security this provision is a nullity, and the coupons would require to be stamped.

COLLINS M.R. This is an appeal from the decision of Walton J. on a question of stamp duty, in which he held that a particular document was sufficiently stamped as a promissory note, and did not require to be stamped as a marketable security. The Crown appeals against this decision.

It is contended on behalf of the Crown that although this document, which is set out at length in the special case, might fall within the definition of a promissory note, it is something more,

(1) (1881) 7 Q. B. D. 165.

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

Collins M.R.

and falls within the description of and is chargeable as a marketable security. That depends upon the definitions in the Stamp Act, 1891, of a "promissory note" and a "marketable security." The former is defined by s. 33 of the Act thus: "(1.) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money. (2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money." That definition undoubtedly covers a great many things that would not be embraced in what may be called a commercial promissory note as defined in s. 83 of the Bills of Exchange Act, 1882. On the other hand, as has been pointed out more than once in decided cases, it is not possible to give an absolutely unlimited extension to the definition in the Stamp Act. The ordinary sense of the expression "promissory note," although it does not conclude the matter, is a factor in determining whether a particular document falls within the definition in the Stamp Act or outside it. That factor, from the point of view of a person conversant with negotiable instruments, has been under consideration more than once in the cases that have been cited to us, more particularly in *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1), and in a subsequent case in the Court of Appeal the point was considered by Lord Esher and the Lords Justices who formed the Court—*Brown, Shipley & Co.* v. *Inland Revenue Commissioners.* (2) We cannot, therefore, in arriving at a conclusion in this case, exclude the popular sense attached to the expression "promissory note." I agree with the learned judge that the document in question, though capable of coming within the definition of a promissory note, is not that which a commercial person would call a promissory note. It has all the incidents that have been pointed out by the counsel for the Crown. It is made by a foreign Government and has coupons attached to it. It is not necessarily a promise to pay a fixed definite sum; the sum paid may vary, and the interest may

(1) 7 Q. B. D. 165. (2) [1895] 2 Q. B. 598.

also vary, by payment upon notice before maturity. These are not matters consistent with the ordinary notion of a promissory note, though the document is capable of falling within the statutory definition in the Stamp Act. Authorities have been cited to us which seem to me to establish clearly that, if a document falls within one class of taxable instruments, but also falls within another class to which a higher scale of duty is attached, it may be treated for the purpose of taxation as falling under the higher scale. The question, therefore, that arises in this case is whether this document, though capable of being classed as a promissory note, may not also be capable of coming under the head of "marketable security." In relation to that question evidence was given before the learned judge that this instrument was of such a description as to be capable of being sold on the Stock Exchange, and he found as a fact that it was. It appears that in arriving at that conclusion he did not consider that the mere fact that a security could be sold on the market was in itself conclusive evidence that it was a marketable security, but, while rejecting that larger view which would bring anything sold on the Stock Exchange into the category of "marketable security," he came to the conclusion in this particular case, and as to this particular instrument, that it was a marketable security.

In these circumstances, under what scale is this document to be stamped? It appears to me that the authorities are conclusive upon this point. The first of them is the case to which I have already referred, *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1), decided by Grove J. and Lindley J. It seems to me that case and others that have followed, which will be found at p. 9 of Highmore's Stamp Laws, established that the Court has not only the right to treat, but is bound to treat, an instrument as assessable under that category which involves the higher stamp duty, so that, when once there is a clear finding of fact that the instrument is a marketable security, the matter of the incidence of stamp duty is determined. I must notice, what was indeed the main point made on behalf of the original appellants, the argument that a

(1) 7 Q. B. D. 165.

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

Collins M.R.

security of a kind that can be described as marketable involves hypothecation of property as security for the debt for which it is issued. That argument appears to me not to be tenable. No authorities were advanced to confirm that view, and the argument would carry the matter a great deal too far. The schedule to the Stamp Act of 1891 contains the following clauses dealing with the amount of stamp duty payable: "Bill of exchange—payable on demand or at sight or on presentation. Bill of exchange of any other kind whatsoever (except a bank note) and promissory note of any kind whatsoever (except a bank note)—drawn, or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom"; and there is a scale under which they pay duty. Then follow certain exemptions, one of which is: "(11.) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security." It would follow that, unless a bill of exchange which does not involve hypothecation of any sort can still be treated as a security, the Legislature have failed to give the exemption to the coupons which was obviously intended. That appears to me to be conclusive that bills of exchange are treated by the Act as securities, and securities though they do not involve in that connection the existence of any hypothecation. But then it was said if that is admitted the argument was not intended to extend to anything but marketable securities, and that the term "security," when used of something that is or must be marketable, involves hypothecation. No authority has been cited in support of this view, and it seems to me that we are not called upon to make such a distinction where the Legislature has given no indication to that effect. Bills of exchange and promissory notes are treated as securities, and then marketable securities are dealt with, and it seems to me quite clear that this instrument comes within the definition of "marketable securities" and is liable to the higher stamp duty.

Sect. 82 of the Act is that which deals with marketable securities, and so far as is material for present purposes it runs as follows: "Marketable securities for the purpose of the charge of duty thereon include— . . . . A marketable security by or on

behalf of any foreign State or Government . . . . which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom." All those conditions are fulfilled with reference to the instrument in this case, and it seems to me, therefore, that it ought to be dealt with as a marketable security, and I think that the learned judge was wrong in limiting its liability to that of a promissory note.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons. The difficulty, so far as there is one, seems to me to depend upon the word "security." Does that or does it not involve any hypothecation? Is it or is it not satisfied by what I may call a personal security apart from any hypothecation? I think it is, for the reasons which have been given by the Master of the Rolls, but I wish also to call attention to the schedule so far as it relates to "mortgage, bond, debenture, covenant." These are charged when they are the only or principal or primary security for the payment of money or collateral security for the payment of money. Then we have a decision given twenty-five years ago in the case of *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1) that a debenture is chargeable with duty under that heading, although there is no kind of hypothecation to be found in it. I cannot accede to the suggestion that that decision in any way depended upon or was founded upon estoppel or anything in the nature of estoppel. No doubt there was the fact, which was thrown in, that the parties had called it a debenture, but that was not enough in itself to make it a debenture within the meaning of the Act. I think it is impossible to read the judgments of Grove J. and Lindley J. in that case without considering that those learned judges held that a debenture giving merely a personal security without hypothecation was a security within the meaning of this Act. If that is so, the only question that remains is whether the document is a marketable security within the meaning of the Act. There is a definition of "marketable security" in s. 22 of the Act: "The expression

(1) 7 Q. B. D. 165

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy L.J.

'marketable security' means a security of such a description as to be capable of being sold in any stock market in the United Kingdom." That definition involves an issue of fact. The question is not merely whether the security has in one case been so dealt with, but whether it is, in the fair sense of the word, a security of such a description as to be capable of being sold in any stock market in the United Kingdom. In this case Walton J. heard evidence upon that point and came to a conclusion upon it. It is not for us to differ from him; and it has not been suggested that we should differ from him upon that point.

The learned judge seems to have distinguished *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1) on the ground that Grove J., at the end of his judgment, seems to treat the fact that the parties had called the document a debenture as very nearly conclusive. I do not think that is, with great respect to the learned judge, a complete and satisfactory statement of that judgment. In my view that decision was perfectly right, and ought to be followed, and, with the greatest possible respect for Walton J., I think this appeal ought to be allowed.

FARWELL L.J. I am of the same opinion. We were invited by counsel for the Crown to say that this document was a debenture. It is not necessary to determine that point, because it answers their purpose even better to have it treated as a "marketable security"; but I should like to say for myself that I should require to consider the matter further before I held it to be a debenture, having regard to the fact that under s. 15, if it is a debenture, there is a penalty for not stamping it within a certain time, and I cannot believe that debentures issued by foreign Governments come within the purview of this section. I feel no difficulty myself in saying that this is, within the definition of s. 33, a promissory note, inasmuch as it is a document or writing containing a promise to pay a sum of money, and there is no difficulty arising from that promise being by a foreign Government. The case of *Rothschild* v. *Inland Revenue Commissioners* (2) shews that to be immaterial. The description in the schedule of bills

(1) 7 Q. B. D. 165. (2) [1894] 2 Q. B. 142.

of exchange and promissory notes is limited to bills and notes "drawn" or "expressed to be payable"—which this is—"or actually paid or indorsed," or "in any manner negotiated in the United Kingdom," which this has been. So there is a restriction in such cases which does not exist in the case of a debenture.

I am of opinion that this is a promissory note within the meaning of the Act. Then is it also a marketable security? Again, I have no doubt myself that it is a marketable security. The word "security" in this context is not used in the strict sense of something having tangible security to back it, but as including that which Rigby L.J., in the case of the *National Telephone Co.* v. *Inland Revenue Commissioners* (1), termed personal securities. A promissory note is simply a personal security. Cozens-Hardy L.J. has already pointed out that we have here the advantage of using the schedule of the Act as its own dictionary, because it is plain under the head of "Mortgage, Bond, Debenture, Covenant," and also under the head "Bond, Covenant or Instrument," which appears earlier in the schedule, that the word "security" is used when there is no idea of any property being brought in, but simply to represent the actual covenant.

There may be observations in the case of *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (2) which seem a little discordant with this view; but such observations were not necessary to the decision, and the judges, as I understand them, were guarding themselves by shewing there was an additional reason for not deciding against the view we are now taking.

To my mind the gist of liability to taxation under this head depends on securities being marketable in the sense used by Lord Shand in *Texas Land and Cattle Co.* v. *Inland Revenue Commissioners* (3), namely, "of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought." In other words, they must be what are commonly called Stock Exchange securities. We have been told that a motor car can be sold on the Stock Exchange. It may be so, for anything I know to the contrary, but certainly

(1) [1899] 1 Q. B. 250. (2) [1895] 2 Q. B. 598.
(3) (1888) 16 R. 69, at p. 72.

C. A. 1906

SPEYER BROTHERS v. INLAND REVENUE COMMISSIONERS.

Farwell L.J.

nobody would call it a Stock Exchange security. Without attempting to define what such a security is, I think most people understand what is meant by Stock Exchange securities, and, in my view, that is what the Legislature intended in this case.

I am not impressed by the argument that because this is a promissory note properly so called it cannot also be a marketable security properly so called when the facts are applied to it. If that is so, it follows from the decision of Kennedy and Phillimore JJ. in *Noakes* v. *Inland Revenue Commissioners* (1), and also from the judgment of Kay L.J. in *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (2), that when the Inland Revenue authorities wish to stamp the document with the higher stamp which they are entitled to put on "marketable securities," there is no answer to their claim to do so. I do not see, if the Crown has not this choice, how the question of imposing the higher or the lower duty is to be settled.

I agree, therefore, that the judgment should be reversed.

Appeal allowed.

Solicitors for appellants: *Bircham & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) (1900) 83 L. T. 714. (2) [1895] 2 Q. B. 598, at p. 603.

A. M.

UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION.

1906
Dec. 4, 5.

Insurance (Marine)—Charterparty—Freight—Loss—Saving of Charterparty Hire—Commission.

The rule established in *Palmer* v. *Blackburn*, (1822) 1 Bing. 61, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net, amount of the freight, applies not only to cases where the assured is the owner, but also where he is the charterer of the ship.

The plaintiffs chartered a ship for twelve months and effected an open policy on freight $\frac{\text{and}}{\text{or}}$ chartered freight. During the currency of the policy the ship was sub-chartered from the plaintiffs for a voyage. The ship stranded through perils insured against, and the plaintiffs suffered a loss of part of the freight which they would otherwise have earned under the sub-charterparty, but they were saved the expense of two days' charterparty hire. The plaintiffs had paid a commission on obtaining the sub-charterparty:—

Held, that the hire saved could not be deducted from the amount recoverable on the policy;

Held, also, that, in the absence of any evidence of custom, the amount of the commission could not be added to the amount of the loss.

Forbes v. *Aspinall*, (1811) 13 East, 323, discussed.

Action in the commercial list tried by Channell J. without a jury.

The plaintiffs' claim was for a loss under a policy of insurance on freight made by the defendants. The facts, so far as material to the questions dealt with in this report, were as follows: By a charterparty made between the plaintiffs and the owners of the steamship *Hero* the plaintiffs chartered the *Hero* for twelve calendar months from the time of delivery, the hire being 900*l.* per calendar month and at the same rate for any part of a month. Clause 16 of the charterparty provided: "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding or damage preventing the working of the vessel for more than twenty-four consecutive working hours the payment of hire shall cease until she be again in an efficient state to resume her service . . . ."

The *Hero* came on service under the charterparty on July 30, 1900, and on the termination of the twelve months it was agreed

1906

UNITED STATES SHIPPING COMPANY v. EMPRESS ASSURANCE CORPORATION.

between the plaintiffs and the owners that the charterparty should be prolonged for a further six months at a hire of 810*l.* per month, with a further prolongation of nine months at the plaintiffs' option.

The policy of insurance sued upon was a policy for 1000*l.* on "freight $\frac{\text{and}}{\text{or}}$ chartered freight" of the *Hero* from July 30, 1901, to July 30, 1902, against the usual perils, including perils of the seas.

On November 20, 1901, the plaintiffs, as chartered owners of the *Hero*, entered into a charterparty with an American railway company for the carriage of a cargo of coal in the *Hero* from Baltimore to Colon, Central America. A cargo of 3197 tons of coal was shipped, and on December 24, 1901, the *Hero* arrived at Colon, and the discharge of her cargo was begun. On December 31, 2298 tons of the cargo having then been discharged, the vessel stranded through perils of the seas and became a constructive total loss. That part of the cargo which had not been discharged was lost, and there was a total loss of freight in respect thereof.

Various issues of fact were raised between the parties which it is unnecessary to refer to here, the only questions in the case requiring a report being—

(1.) Whether the sum recoverable by the plaintiffs under the policy ought to include not only the premium on the policy, but also 16*l.*, being commission which had been paid by the plaintiffs for getting the Baltimore to Colon charterparty;

(2.) Whether 54*l.*, representing two days' hire of the *Hero*, ought to be deducted from the plaintiffs' claim on the ground, as the defendant contended, that it would have taken two days to discharge the cargo which was still on board when the vessel stranded.

Scrutton, K.C., and *Adair Roche*, for the plaintiffs. The plaintiffs are entitled to recover the amount of the commission paid on obtaining the Colon charterparty. Their right to do so rests upon the same principle as that which makes the premium paid for the insurance recoverable on an open policy on freight. The amount of hire which the plaintiffs would have had to

pay if the cargo had not been lost cannot be deducted. In *Palmer* v. *Blackburn* (1) a usage was proved that the loss on an open policy on freight shall be adjusted on the gross, and not on the net, amount of the freight. That practice has always been followed: see Arnould on Marine Insurance, 7th ed. s. 365.

Atkin, K.C., and *M. Hill*, for the defendants. There is no authority for the plaintiffs' contention that they can add the amount of the commission to the loss. In *Forbes* v. *Aspinall* (2) Lord Ellenborough, referring to what is recoverable on an open policy on freight, included "the premiums of insurance and commission thereupon," by which he clearly meant commission on the insurance premium. Commission paid for obtaining a charterparty falls within quite a different category, being in the nature of an establishment charge. As to the other point, although the plaintiffs lost their freight on the cargo which had not been discharged, they have been saved the expense of two days' hire which they would otherwise have incurred, and that must therefore be deducted from their claim. The rule as to the recovery of gross freight is an exception to the general principle that insurance is a contract of indemnity, and is established only in the case of the owner of a ship, and does not apply to the case of a charterer who has sub-chartered the ship: see Arnould on Marine Insurance, 7th ed. s. 262; Phillips on Insurance, ss. 337 and 483.

Scrutton, K.C., in reply. It cannot be true, as the defendants contend, that the expression "commission thereupon" in Lord Ellenborough's judgment in *Forbes* v. *Aspinall* (2) means the commission payable on the insurance premium, for that commission is in practice paid by the underwriters, and not by the assured, who accordingly has no interest in it to insure.

CHANNELL J., after dealing with the other questions in the case, said:—I have now to consider the claim by the defendants to deduct 54*l.* from the amount recoverable on the policy for two days' hire, and the claim by the plaintiffs to add 16*l.* for commission on getting the Colon charterparty. Those two items

(1) 1 Bing. 61.

(2) 13 East, 323, at p. 327.

1906

UNITED STATES SHIPPING COMPANY v. EMPRESS ASSURANCE CORPORATION.

Channell J.

are in one sense quite different, but, on the other hand, I think they must be governed by the same rule. It appears quite clear that a rule has been established, originally by the finding of a jury as to custom, that an insurance on freight means an insurance on gross freight; and in the old cases, when the question of commission has been under discussion, it has been put in this way, that the assured "will not go beyond the amount of what the ship would earn with the premiums and commission thereupon." That is the language of Lord Ellenborough in *Forbes* v. *Aspinall* (1) decided in 1811; his words are, "commission thereupon," i.e., commission on the insurance premium, and the same expression occurs, I think, in other cases. It is said—and I have no doubt said accurately—that at the present day the commission to the broker upon the policy is paid by the underwriter and not by the merchant, and that, therefore, there would be nothing to add to the premium for "commission thereupon." However, those are the words used in the old cases, and, though I do not know as a matter of history what was the mode of doing business in 1811, they do suggest that at that time the commission may have been payable by the merchant. Having regard to the fact that this rule as to commission appears to have originated in a practice or custom, I think that if there had been evidence before me in this case of a custom to include a commission paid on getting a charterparty or on getting freight, I might have allowed the commission claimed, but in the absence of any evidence of custom I think I am bound to hold that the commission is not recoverable under the policy, unless it is a commission upon getting a premium.

With regard to the defendants' contention that the amount of two days' hire, 54*l.*, must be deducted from the claim, there are no decisions of the Courts here upon the point, but it does appear that some trustworthy text-writers take the view that, where a charterer loses freight by reason of perils of the sea and by the same event is saved payment in the way of hire, then, notwithstanding the rule as to gross freight, the amount of hire which has been saved may be deducted; and if the question is looked at logically and as a matter of principle, that is clearly

(1) 13 East, 323, at p. 327.

right, because insurance is only an indemnity. But in any case the result of the rule as to gross freight, which is a well-established rule, is that the assured gets more than an indemnity, because he must always save something in the way of expenses. I rather gather that the rule has arisen owing to the difficulty of taking the account. If the principle of indemnity were carefully adhered to, an account would have to be taken in every case shewing exactly what had been lost and exactly what had been saved, and the account would be an extremely difficult one to take, and to get rid of that difficulty, the rule has been adopted that an insurance on freight is to be an insurance, not upon the net amount, but on the gross amount of freight receivable. That being the rule, the defendants are not in my opinion entitled to say that, although the plaintiffs have lost a certain amount of freight, they have by the same cause been saved the cost of two days' hire which would have been incurred if the cargo had not been lost. That is, in effect, asking that an account should be taken, but the rule shews that that is not to be done. On this point, therefore, my decision is against the defendants.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Botterell & Roche.*
Solicitors for defendants : *Goddard & Co.*

F. O. R.

C. A.
1906
Nov. 14.

[IN THE COURT OF APPEAL.]

BULLOCK *v.* THE LONDON GENERAL OMNIBUS COMPANY AND OTHERS.

Practice—Joinder of Causes of Action—Action of Tort—Allegation of Joint Tort—Alternative Allegation of separate Torts—Costs—Costs against Plaintiff of successful Defendant—Addition to Costs recoverable from unsuccessful Defendant—Order XVI., rr. 4, 7.

The plaintiff was injured by a collision between two vehicles, and brought an action against the respective owners. The statement of claim alleged that the injury to the plaintiff was caused by the joint negligence of the two defendants, and it also alleged in the alternative negligence on the part of each defendant causing the injury. No application was made to strike out either of the defendants, and the case went to trial. The jury found negligence on the part of the defendant first named on the record, and negatived negligence on the part of the other defendant. The judge entered judgment for the plaintiff against the first-named defendant and judgment for the successful defendant, with costs in each case. The judge further ordered that the costs so payable by the plaintiff should be included in the costs recoverable from the first-named defendant. On appeal:—

Held, that after verdict and judgment it was too late to object to the jurisdiction to try the action on the ground that torts were alleged severally against the two defendants.

Held, also, that in an action of tort tried with a jury, in which relief is claimed against two or more defendants in the alternative, there is jurisdiction to direct that costs payable to a successful defendant should be included in the costs recoverable by the plaintiff from an unsuccessful defendant.

Per curiam: After the alteration of r. 1 of Order XVI., following on the decision in *Smurthwaite* v. *Hannay*, [1894] A. C. 494, the joinder, in an action of tort, of defendants against whom the right to any relief, in respect of or arising out of the same transaction, is claimed, whether jointly, severally, or in the alternative, is authorized by r. 4 of the order.

Sanderson v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, applied.

Sadler v. *Great Western Ry. Co.*, [1896] A. C. 450, distinguished.

APPEAL from the judgment of Bray J. at the trial of the action with a jury.

The action was brought to recover damages for injuries sustained by the plaintiff through a collision between an omnibus and a cart. The omnibus belonged to the first-named defendants, the London General Omnibus Company, and the

cart to the other defendants, George Trollope & Sons and Colls & Sons, Limited. The statement of claim alleged that the plaintiff had suffered personal injuries by the joint negligence of both of the defendant companies, and, alternatively, that she had suffered such injuries by the separate negligence of each of these companies. Particulars were given in the statement of claim of the negligence attributed to the omnibus company, and also of that attributed to the other defendant company.

The material part of defence of the omnibus company was a denial of the allegation of negligence on their part, either jointly with the other defendants as alleged, or separately. In the particulars they stated that the driver of the cart belonging to the other defendant company was not keeping a proper look-out, and that, so far as the omnibus company were concerned, the collision was inevitable.

The defence of the other defendant company was a denial of negligence on their part and an assertion that the collision was caused by the negligence of the omnibus company.

At the trial the jury found a verdict for the plaintiff for 150*l.* against the omnibus company, and a verdict for the other defendant company.

Application was made on behalf of the plaintiff that the costs payable by her to the successful defendants should be added to the costs which the omnibus company were ordered to pay to her, and the judgment as finally drawn up contained the following clause: "It is adjudged that the plaintiff recover against the defendants the London General Omnibus Company, Limited, 150*l.* damages and her costs of this action to be taxed, such costs to include all costs incurred against the London General Omnibus Company, Limited, by reason of there being two defendants, and further the costs she may have to pay the defendants George Trollope & Sons and Colls & Sons, Limited."

The London General Omnibus Company appealed.

McCall, K.C., and *Ernest Charles*, in support of the appeal. The learned judge, in making the order as to costs, purported to act under Order XVI. and the authority of the case of *Sanderson*

C. A. 1906

BULLOCK v. LONDON GENERAL OMNIBUS COMPANY.

v. *Blyth Theatre Co.* (1) The order relates solely to the joinder of parties, and has no application to the joinder of causes of action, which is dealt with in Order XVIII. In this case two independent causes of action in tort against two defendants, with particulars in each case, have been joined in one action. There is no authority for this in the rules or in decided cases. The allegation of a joint tort against the two defendants does not assist the plaintiff, as is clear from the opinion of Lord Halsbury in *Sadler* v. *Great Western Ry. Co.* (2), who said: "But if it were true that the fifth paragraph sets out a joint cause of action, which I do not think it does, that would not make the case any the better for the plaintiff, because upon that hypothesis he would have joined several causes of action in one count with a joint cause of action in another count which would be equally objectionable." Other authorities against the joinder of separate causes of action in tort against different defendants are *Gower* v. *Couldridge* (3), *Thompson* v. *London County Council* (4), and *Frankenburg* v. *Great Horseless Carriage Co.* (5), though in the last-mentioned case, in an action against a company and its directors, the joinder was held to be right because there was only one cause of action, namely, the improper issue of a prospectus. Even if the proper course would have been to apply to strike out one of the defendants, the effect of that not being done would be that the action would proceed; but there would still be separate torts alleged against the two defendants, and those causes of action could not be treated, as the learned judge has treated them, as interdependent, so as to entitle him to make one defendant pay all the costs incurred by the plaintiff. Costs can only properly follow a successful cause of action, and the assertion of the omnibus company that they were not liable, but that the other defendants were liable, gave no cause of action. It would follow that the costs of these independent causes of action must be dealt with separately. In each case the costs would follow the event, being governed by the provisions of Order LXV., which deals with cases tried with a jury

(1) [1903] 2 K. B. 533.
(2) [1896] A. C. 450, at p. 453.
(3) [1898] 1 Q. B. 348.
(4) [1899] 1 Q. B. 840.
(5) [1900] 1 Q. B. 504.

as this was. The incidence of costs being settled under that order, there was no jurisdiction to make a further order, as was done in this case. *Sanderson* v. *Blyth Theatre Co.* (1) was a case of breach of contract, to which Order XVI., r. 4, applies, but the decision cannot be an authority in this case as to the matter of joinder of causes of action. That case was treated in the Court of Appeal as one of joinder of parties, and not of causes of action. If separate actions had been brought in the present case the cost incurred by the plaintiff in the one in which she did not succeed must have been borne by her, and the same consequences ought to follow in the present action. Even if the learned judge had jurisdiction to make the order as to costs, his discretion in the matter is open to review, and the circumstances attending the accident shew that it was wrongly exercised.

[They referred also to *Smurthwaite* v. *Hannay*. (2)]

D. M. Kerly, for the plaintiff. The argument on behalf of the appellants amounts to an objection to the jurisdiction to try the action, but after the case has gone to trial it is too late to raise that point. There may be joinder of defendants in respect of separate causes of action, but subject to the right to apply to strike out one or other of them. What happened in each of the cases cited was that a claim of right to join causes of action was disallowed. As this case has gone as far as verdict and judgment, the jurisdiction of the learned judge over it cannot now be restricted in any manner.

The right to make the order as to costs arises under the Judicature Act, 1890, s. 5. It is not necessary to find an authority for the order of the learned judge in Order LXV.; it is sufficient if Order LXV. does not limit the jurisdiction under the Act of 1890. *Sanderson* v. *Blyth Theatre Co.* (1) shews that Order LXV. does not prevent the exercise of the general power to deal with costs and to make such an order as was made in the present case. As Stirling L.J. pointed out (3), the Court of Chancery, in making such an order, was not giving substantive relief by way of indemnity or damages or otherwise, but was exercising its jurisdiction over costs. The Admiralty Court

(1) [1903] 2 K. B. 533. (2) [1894] A. C. 494.
(3) [1903] 2 K. B. 533, at p. 543.

C. A. 1906

BULLOCK v. LONDON GENERAL OMNIBUS COMPANY.

also exercises such a jurisdiction: *The River Lagan* (1). In that case the jurisdiction was treated as undoubted, and the precedents cited were not merely Admiralty cases.

There is no decision which binds this Court to say that where two separate causes of action in tort arise out of the same transaction they may not be properly joined. Rule 1 of Order XVI. is an amended rule, which was made in order to remedy the defect in the previous rule indicated by the decision in *Smurthwaite* v. *Hannay* (2), and instead of the rule applying to the same relief being sought the new rule is expressly applied to relief arising out of the same transaction.

If there was jurisdiction to make the order it was undoubtedly properly exercised. The action was one in which all three parties were interested, the fact of the injury to the plaintiff was not disputed, and the question of liability was fought out between the defendants. Having acquiesced throughout in this course being taken, the omnibus company, who have been found to be liable, are now seeking to get off paying the costs of that inquiry.

[He cited also *Honduras Ry. Co.* v. *Tucker* (3); *Bennetts & Co.* v. *McIlwraith & Co.* (4)]

Ernest Charles, in reply. The power to deal with costs given by s. 5 of the Judicature Act, 1890, is expressly made subject to the rules, and therefore to the provision in Order LXV., r. 1, as to costs following the event in cases tried with a jury, unless good cause is shewn for a departure from that rule.

COLLINS M.R. This is an appeal from an order made by Bray J. The action was brought to recover damages in respect of personal injuries sustained by the plaintiff. The plaintiff joined as defendants the General Omnibus Company, the owners of the omnibus in which she was a passenger, and the owners of another vehicle which, in her view, took a part in bringing about the collision which caused the injuries of which she complained. Her case was framed in the statement of claim in three ways. Firstly, it was charged that the two defendants

(1) (1888) 6 Asp. M. L. Cas. 281.
(2) [1894] A. C. 494.
(3) (1877) 2 Ex. D. 301.
(4) [1896] 2 Q. B. 464.

by their joint negligence caused the injuries sustained by the plaintiff, and then followed a charge of negligence against each of the defendants separately. In the result there was a verdict for the plaintiff against the General Omnibus Company and against the plaintiff in favour of the other defendants. The learned judge entered judgment for the plaintiff, with costs against the General Omnibus Company, and a verdict for the other defendants, with costs against the plaintiff. Having got thus far, he made an order that there should be included in the costs recoverable from the General Omnibus Company by the plaintiff the costs that she had to pay to the other defendants. The common sense underlying this order is clear, because the learned judge when he made it had before him evidence that, owing to the attitude taken up by the General Omnibus Company, it was reasonable for the plaintiff to join the other defendants.

That there was jurisdiction to make this order also seems to me to be clear from the provisions of s. 5 of the Supreme Court of Judicature Act, 1890, which is in the widest terms. It runs thus: "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." The only matter that has been referred to as a suggested qualification, in the present case, of the discretion of the judge to deal with costs is Order LXV., r. 1, as to costs following the event in cases tried with a jury. It does not seem to me that the order of the learned judge involved any departure from that rule, which he has followed and superadded something which comes within the wide powers given by the Act of 1890. I do not take my stand altogether on my personal judgment in this matter, because the point was dealt with by Stirling L.J. in the case of *Sanderson* v. *Blyth Theatre Co.* (1), where he said: "This particular form of order was, as Jessel M.R. calls it, 'machinery' for properly

(1) [1903] 2 K. B. 533, at p. 543.

C. A. 1906

BULLOCK v. LONDON GENERAL OMNIBUS COMPANY.

Collins M.R.

disposing of the costs, and this is shewn by the change in the form of order when, as in the case of the Attorney-General, the plaintiff could not be ordered to pay costs. Having regard to this and to the express directions of Order LXV., r. 27, regulation 37, I think that the term 'costs' in s. 5 of the Judicature Act, 1890, ought to be read as including costs which a particular party may be ordered to pay in the first instance and then to have over against another." In my opinion the objection taken upon the ground of want of jurisdiction to the order of the learned judge fails. Upon the merits the order seems to me to be clearly right, and no argument has been brought before us to shew that it was not so.

An elaborate argument has been addressed to us upon another point which is said to afford a ground for impugning the order, the point being that there had been a misjoinder of separate causes of action. If in fact there was such a misjoinder, it was for the defendants to take steps to remedy it; no such steps were taken, and it is much too late to complain of the irregularity if there was one. I see no connection between the right to make such an order as that made in the present case and a technical error which could have been remedied at the proper time.

As to the cases cited to support the suggestion of misjoinder of separate causes of action, I do not think that they touch this case. There is here an averment of a joint tort by both sets of defendants, with a separate charge of tort against each. In *Sadler* v. *Great Western Ry. Co.* (1) there was no averment of a joint tort, but an attempt was made to combine in one action a claim for damages arising from separate torts of two defendants. In *Smurthwaite* v. *Hannay* (2) there were a number of plaintiffs whose causes of action were separate and distinct, and it was held that they could not be joined in one action under Orders XVI. and XVIII. or otherwise. The case did not come within the old Order XVI., r. 1, which has been qualified by a subsequent alteration.

The case of *Sanderson* v. *Blyth Theatre Co.* (3), to which I

(1) [1896] A. C. 450. (2) [1894] A. C. 494.
(3) [1903] 2 K. B. 533.

have already referred, seems to me to be conclusive in this matter. That was a case arising out of contract, and the plaintiff claimed relief against the defendants alternatively. It is said that there is a distinction in this respect between the law applicable to torts and that applicable to contracts, but I cannot see any reason for such a distinction. Rule 4 of Order XVI. does not suggest such a distinction, while the wording of other rules of the same order, as for instance r. 7, is applicable to a claim for reparation of a wrong done. The application of r. 4 to a particular case does not arise upon proof of a joint or other wrong, but upon the state of mind of a plaintiff who does not know exactly whether an injury of which he complains arose from the joint act of two parties or the sole act of one or other of them. Rule 4 of the order permits the joining as defendants of all persons against whom a right to relief is "alleged" to exist and recovery of judgment against such one or more of them as may be "found" to be liable. I can see no reason for limiting this rule to cases of contract, which would result, in a case like the present, in the necessity upon the plaintiff to bring three actions, one against both sets of defendants and one against each set separately. I think that the objections to the jurisdiction of the learned judge to make the order fail, and that there is no ground for saying that he exercised his discretion otherwise than rightly.

The appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. On the main point of jurisdiction to try the action it is enough to say that the objection comes too late. It is not open, after verdict and judgment which the defendants are not seeking to upset, to raise the question of jurisdiction to try the action.

A confusion seems to me to have arisen from not recognizing the material alteration in Order XVI., r. 1, arising from and after the decision in *Smurthwaite* v. *Hannay*. (1) The original rule was, "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative"; and it was held that the rule contemplated,

(1) [1894] A. C. 494.

C. A. 1906

BULLOCK v. LONDON GENERAL OMNIBUS COMPANY.

Cozens-Hardy L.J.

not any right to relief, but the single cause of action and relief in respect of it. The new rule of October, 1896, is markedly different. The words are, "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative." I think it is difficult to say that, since the amendment of that rule, the order does not deal with joinder of causes of action but deals only with joinder of parties.

The facts of the case are that there was a judgment for the plaintiff against the General Omnibus Company and a judgment in favour of the other defendants. Costs followed in each case, but the question is what is the meaning that the learned judge was entitled to give to the term "costs" in s. 5 of the Judicature Act, 1890. The Master of the Rolls has referred to the opinion of Stirling L.J., in giving judgment in *Sanderson* v. *Blyth Theatre Co.* (1), that it includes costs which a particular party may be ordered to pay in the first instance and then to have over against another; but I may refer also to the judgment of Romer L.J. in the same case (2), in which he said: "This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant." That was the principle adopted by the learned judge in this case, and in my opinion he had ample jurisdiction to make the order, and good ground for the exercise of his discretion in making it.

FARWELL L.J. If the argument as to the want of jurisdiction of the learned judge to try this action were to prevail, the result would be that a person in the position of this plaintiff would be obliged to bring three actions upon the same facts. I do not think that we are driven to a conclusion which would have that

(1) [1903] 2 K. B. 533, at p. 543. (2) Ibid. at p. 539.

result, because the decision in *Sanderson* v. *Blyth Theatre Co.* (1) covers this case so far as the right to direct how the costs are to be borne is concerned, and the decision in *Frankenburg* v. *Great Horseless Carriage Co.* (2) covers it in the matter of the joinder of torts. In that case, Lindley M.R., after pointing out that as against the company the plaintiff was not asking for damages, but for rescission of contract, continued: "The company may, however, be in such a state of impecuniosity that it cannot give him his money back, and therefore he asks for damages against the directors. That, no doubt, is a different species of relief; but to say there should be as many actions as there are classes of defendants would be to render these actions unmaintainable."

As to the order to add the costs paid by the plaintiff to the costs recoverable by her from the General Omnibus Company, the jurisdiction to make such an order is incidental to the right to try the action, and it is impossible to attack the former without attacking the latter. The defendants are therefore logically driven to say that, as the torts alleged against the two sets of defendants could not be joined, the action should have been dismissed. Whatever view may be taken as to the right to join claims against the two sets of defendants, it is obvious that it is quite impossible at this stage of the litigation to allow the question of misjoinder to be raised.

Appeal dismissed.

Solicitors for plaintiff: *Langhams.*

Solicitors for the London General Omnibus Company: *Hicks, Davis & Hunt.*

(1) [1903] 2 K. B. 533. (2) [1900] 1 Q. B. 504.

A. M.

C. A.
1906
Dec. 10.

[IN THE COURT OF APPEAL.]

MAXWELL *v.* VISCOUNT WOLSELEY.

Practice—Payment into Court without denial of Liability—Action of Libel—Death of Plaintiff—Abatement of Action—Jurisdiction as to disposal of Money in Court—Payment to Executor of Plaintiff.

In an action of libel the defendant pleaded an apology and payment of money into Court. The plaintiff did not take the money out of Court; and he died before the action came on for trial. An order was made by a judge at chambers that the money should be paid out to the executor of the plaintiff. On appeal:—

Held, that the judge had power in his discretion to make the order.

Brown v. *Feeney*, [1906] 1 K. B. 563, applied.

Appeal from an order of Bray J. at chambers directing that a sum of money paid into Court by the defendant should be paid out to the executor of the plaintiff.

The action was one of libel, in which the defendant by his defence admitted that the words complained of were defamatory and withdrew them, offered an apology, and brought into Court the sum of fifty guineas as sufficient with the apology to satisfy the claim of the plaintiff. The plaintiff died before the action came on for trial, not having in the meantime taken the money out of Court. The defendant applied at chambers for an order that the money should be paid out to him, and the executor of the deceased plaintiff made a cross application that the money should be paid out to him as executor. No technical objection was taken to the application of the executor, and the learned judge made an order that the money should be paid out to him. Against this order the defendant appealed.

Eustace Hills, for the defendant. Up to the passing of the Judicature Acts money paid into Court belonged to the plaintiff in any event, but that is not so now. The money remains the property of the defendant, and the plaintiff is only entitled to the amount that he recovers, any balance remaining the property of the defendant and being paid out to him: *Gray* v. *Bartholomew*. (1)

(1) [1895] 1 Q. B. 209.

In that case 5*l.* was paid into Court in an action of slander, and the plaintiff recovered a farthing damages, and the 5*l.*, less the farthing, was paid out to the defendant. If both parties participate in the trial of the action there is a discretion given to the judge by Order XXII., r. 5, as to payment out of the money, but until some part of it is otherwise appropriated it remains the property of the defendant. *Brown* v. *Feeney* (1) is a converse case to the present one; there the defendant died, but, though the action abated, the liability and the amount to which the plaintiff was entitled as a solatium had been admitted by the defendant. There is a wide difference between the case of money paid to the injured person whose feelings have been hurt, and money paid as a bonus to the estate of a deceased person. Under no circumstances could this action be continued, whereas under some circumstances, as, for instance, if the estate of the deceased defendant had profited by the libel, an action may be continued against the executors: *Peek* v. *Gurney*. (2)

Yelverton and *G. L. Hardy* were not called on to argue.

COLLINS M.R. This is an appeal from an order made by Bray J. at chambers in an action of libel. The defendant pleaded an apology and payment of fifty guineas into Court without any denial of liability. Before any further steps were taken in the action the plaintiff died. A summons was taken out by the executor of the deceased plaintiff, all technical objection to it being waived, and a cross summons by the defendant to determine what was to be done with the money in Court, and the learned judge in the exercise of his discretion directed that it should be paid to the executor of the deceased plaintiff. Against this order the defendant now appeals.

The case was argued on behalf of the defendant with reference to first principles and upon authority, but the cases cited as authorities seem to me to be conclusive against the defendant. The first case is *Gray* v. *Bartholomew*. (3) In that case, in an action for slander, the defendant paid 5*l.* into Court. The plaintiff proceeded with the case and recovered a farthing damages

(1) [1906] 1 K. B. 563. (2) (1873) L. R. 6 H. L. 377.
(3) [1895] 1 Q. B. 209.

C. A. 1906

MAXWELL v. WOLSELEY (VISCOUNT).

Collins M.R.

and judgment was entered for the defendant with costs. The judge directed that the money paid into Court, less one farthing, should be paid to the defendant. On appeal the Court held that the judge had power to make such an order. The power to direct that the money should not be paid out to the plaintiff but should be paid to the defendant shews that the latter could not demand repayment as of right and without the exercise of the judge's discretion. The other case is *Brown* v. *Feeney* (1), an action of libel in which the defendant paid money into Court without denying liability. The action proceeded till abated by the death of the defendant, whose executors applied that the money in Court should be paid out to them. One argument in support of the application was that, the action being dead, there was no power to deal with the money under the rules, and so the defendant was entitled to have his money handed back to him, as the purpose for which it had been paid in had failed. The Court held that they had jurisdiction over the payment out of the money, with the result that, exercising a discretion in the particular case, they ordered the money to be paid out to the plaintiff. That is a strong authority against the defendant in this case, because, that action having abated, the money was, so to speak, derelict in Court, yet the Court held that they had jurisdiction in their discretion to direct that it should be paid to the plaintiff. Similarly the learned judge in the present case has exercised his discretion. That he had jurisdiction to make the order appears to me to be clear, and I can see no ground for saying that his discretion was wrongly exercised. The appeal fails and must be dismissed.

FARWELL L.J. I agree. I think that we are bound by the principle underlying the decision in *Brown* v. *Feeney*. (1) It is clear that, the action having come to an end by the death of the plaintiff, Order XXII., r. 5, does not apply. In the case to which I have referred the defendant had died, and his legal personal representatives were not parties to the action and could not be made parties. In this case the plaintiff has died, and his executor cannot continue the action, but, as in the other case,

(1) [1906] 1 K. B. 563.

there must be a discretionary jurisdiction over the disposition of the money in Court. This was pointed out by Stirling L.J. in his judgment, in which he quoted a passage from the judgment of the Lord Chancellor in *Wynne* v. *Jackson* (1) to the effect that if a bill is dismissed where money has been brought into Court by the plaintiff, the Court must part with the money to some one or other. The way in which that discretionary jurisdiction should be exercised was indicated by the Lord Justice later in his judgment, in a passage in which he pointed out that in order to justify the Court, in that case, in directing payment to the defendant's personal representatives they ought to shew such grounds for depriving the plaintiff of his right as the defendant would have had to shew, if he had been alive and the action was still in existence. Applying that test to this case, the defendant has not shewn any ground which would have deprived the plaintiff, had he been living, of his right to the money.

I can see no valid objection to the order made by the learned judge in his discretion, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Weatherley & Co.*
Solicitors for defendant: *Hills & Halsey.*

(1) (1826) 2 Russ. 351.

A. M.

1906
Nov. 5.

DAWES *v.* WILKINSON.

Adulteration—"Prejudice of the Purchaser"—Rum diluted with Water—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6.

A notice exhibited by an innkeeper that "All spirits sold in this establishment . . . . in order to comply with the Food and Drugs Act, will not be of any guaranteed strength" is not sufficient to bring to the mind of the purchaser the fact that the spirits sold are diluted to a strength below the standard provided by s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879. Therefore, where rum is sold by the innkeeper consisting of 96·3 parts of rum of 25 degrees under proof as mentioned in s. 6 of the Act of 1879 and 3·7 parts of added water, the notice is not sufficient to protect the innkeeper from conviction under s. 6 of the Sale of Food and Drugs Act, 1875, for selling rum to the prejudice of the purchaser.

So *held* by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting).

Case stated by justices for the county borough of Derby.

An information was preferred by William Wilkinson, the respondent, under s. 6 of the Sale of Food and Drugs Act, 1875 (1), against Richard Dawes, the appellant, for that he did at the said county borough unlawfully sell a certain article of food, to wit one quartern of rum, which was not of the nature, substance, and quality demanded by the respondent, the purchaser thereof, that is to say, was not rum, but consisted of 96·3 parts of rum of 25 degrees under proof, as mentioned in s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879 (2), and 3·7 parts of added

(1) Sale of Foods and Drugs Act, 1875, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."

Sect. 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

(2) Sale of Food and Drugs Act Amendment Act, 1879, s. 6: "In determining whether an offence has been committed under section six of the said Act" (i.e., the Sale of Food and Drugs Act, 1875) "by selling, to the prejudice of the purchaser, spirits

water, to the prejudice of the respondent, contrary to the form of the statute in such case made and provided.

Upon the hearing of the information the following facts were proved:—

The appellant is a licensed victualler, and keeps the Green Man Inn, 32, Kensington Street, in the county borough of Derby. The respondent is the chief inspector of nuisances for the county borough.

On April 26, 1906, one Stephen James Laver, an assistant inspector of nuisances for the borough acting on behalf of the respondent, went to the appellant's inn and there asked to be supplied with one quartern of rum. The rum was placed in a bottle by the appellant's wife without any label thereon, and Laver then paid 7½*d.* for the rum and took possession of the same.

At the time of the purchase a notice in large print was hung up in the passage of the appellant's inn between the serving window and the door of the entrance in a conspicuous position. The notice was produced in Court, and was as follows:—

"NOTICE.

"All spirits sold in this establishment are of the same quality and strength as heretofore, but in order to comply with the Food and Drugs Act, will not be of any guaranteed strength.

"Also all brandies sold here will be of the same superior quality, but not guaranteed to be solely derived from the juice of the grape.

"Issued by the authority of the Derby and District Licensed Victuallers Association."

The above notice was so hung and printed as to be clearly visible to all persons going up the passage to the serving window, at which place Laver purchased the rum.

After the purchase the respondent entered the inn and informed the appellant that the rum had been purchased for the purpose

---

not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than twenty-five degrees under proof for brandy, whisky, or rum, or thirty-five degrees under proof for gin."

1906

DAWES v. WILKINSON.

of analysis, and divided the sample into three equal parts, and gave one portion to the appellant, sent one portion to the public analyst, and produced the third portion before the justices at the hearing.

The certificate of the public analyst, dated May 11, 1906, which the justices held to be correct, was as follows (omitting immaterial parts) :—

"I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under,— Rum of 25 under proof as mentioned in section 6 of 42 & 43 Vict. c. 30—

96·3 parts
added water 3·7 parts

100·0 parts."

On the part of the appellant it was contended (inter alia) that the sale was not to the prejudice of the purchaser, inasmuch as the notice was posted in a conspicuous position and was clearly visible to the appellant's customers and to any purchaser of spirits, and that the appellant had taken sufficient steps to inform Laver that the rum was diluted, and that he had sold the rum without any guarantee as to the strength thereof, and that therefore no offence had been committed within the provisions of the Sale of Food and Drugs Acts.

On the part of the respondent it was contended (inter alia) that the notice was not sufficient, inasmuch as the same did not contain the word "diluted" or a word or words to that effect, that the purchaser was not thereby notified that the rum was diluted, and that consequently the rum was not of the nature, substance or quality demanded by him.

The justices were satisfied that in fact the notice was sufficiently and conspicuously posted, and that it was clearly visible to all intending purchasers at the appellant's inn, and that the appellant had taken sufficient steps to bring the same to the attention of intending purchasers ; but they decided as a matter of law on the construction thereof that the wording of the notice was not sufficient, inasmuch as it did not use the word "diluted," or a word or words to that effect, that the absence of such words was

atal to the contention of the appellant, and they therefore convicted and fined the appellant.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law with respect to the meaning and effect of the notice and as to the contention of the respondent.

H. A. McCardie, for the appellant. The notice was sufficient to protect the appellant from conviction. The word "strength" in the notice is generic, and the purchaser having that notice given to him takes the risk of the rum being diluted down to a less strength than 25 degrees under proof. Before the Sale of Food and Drugs Act Amendment Act, 1879, there was no legal standard of strength for spirits. Sect. 6 of that Act made it a good defence to prove that rum was not diluted below 25 degrees under proof. *Sandys* v. *Small* (1) shews that there is no sale to the prejudice of the purchaser within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875, although the rum is diluted down to below the legal standard of 25 degrees under proof, if the seller brings to the purchaser's notice the fact that the rum is so diluted. The notice exhibited by the appellant was sufficient for that purpose. In *Sandys* v. *Small* (1) Cockburn C.J. gave considerable effect to the word "mixed." It is not necessary that the word "diluted" should occur in the notice if the meaning of the notice is that the purchaser of the rum takes the risk of its strength having been reduced below 25 degrees under proof. There is no commercially pure rum under s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879, because it may be diluted down to 25 degrees under proof.

Etherington Smith, for the respondent. The notice did not contain a sufficient statement that the rum was diluted. The meaning of the word "strength" when applied to spirit refers to the strength of the spirit, quite apart from anything having been added by way of dilution by water. The notice therefore did not sufficiently bring to the purchaser's mind the fact that the spirit had been diluted.

(1) (1878) 3 Q. B. D. 449.

1906

DAWES v. WILKINSON.

McCardie, in reply. The notice says that the spirits are not "of any guaranteed strength."

[DARLING J. referred to *Gage* v. *Elsey*. (1)]

As the seller did not guarantee the rum to be of any strength, he could sell it as diluted as he pleased.

DARLING J. As we are not agreed in this case, it becomes my duty to deliver judgment first. The appellant was summoned for selling to the prejudice of the purchaser one quartern of rum which was not of the nature, substance and quality demanded by the purchaser. That would be an offence under s. 6 of the Sale of Food and Drugs Act, 1875. If the appellant gave a notice which brought home to the mind of the purchaser the fact that the thing he asked for was diluted, so that there was no assurance by the appellant that it was rum, it would be open to the justices to find that it was not sold to the prejudice of the purchaser. In that case there would be no offence committed because the purchaser would have been warned that the rum was diluted. In the present case rum was asked for. Although it was diluted it was in my opinion still rum. In *Gage* v. *Elsey* (1) the spirit had been diluted with water so as to reduce its strength to $5\frac{1}{2}$ degrees below the minimum strength allowed by the Sale of Food and Drugs Act Amendment Act, 1879; and although the dilution was greater than in the present case, Manisty J. said that "notice having been given to the respondent that the article sold to him was not of the nature, substance, and quality of the article demanded, there was no sale to the prejudice of the purchaser, and no offence within the meaning of s. 6 of the Act of 1875. The appellant cannot indeed avail himself of a defence under s. 6 of the amending Act of 1879, the gin being below the minimum strength allowed by that section; but he is not deprived of any defence which he may have under the Act of 1875."

The question is, did the appellant give a sufficient notice to prevent the sale being to the prejudice of the purchaser? In my opinion he did. If the stuff had not been reduced to more than 25 degrees under proof it would have complied with s. 6 of the

(1) (1883) 10 Q. B. D. 518.

Sale of Food and Drugs Act Amendment Act, 1879. If all that was meant by the notice was that the rum had been reduced to 25 degrees under proof it would not have been necessary to give it, because there would be a good defence under s. 6 of the Act of 1879 without any notice being given. Therefore the notice must mean that because the stuff might have been reduced to more than 25 degrees under proof, it would be a sale to the prejudice of the purchaser if the seller did not tell him that it might be more than 25 degrees below proof. In my opinion, therefore, no offence was committed by the appellant.

RIDLEY J. I am of the contrary opinion. I agree to a great extent with what Darling J. has said, but I take a different view of the effect of the decision in *Gage* v. *Elsey*. (1) In that case it was clear that an offence had been committed as far as s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879, was concerned; but the Court held that the then appellant was protected from conviction because the notice which he had given was sufficient to prevent the sale from being to the prejudice of the purchaser. It is clear, from the judgments, that the decision turned upon the sufficiency of the notice, which was that the spirits were sold as diluted spirits. That gave exactly the information, which is not given in the present case. The notice in this case may mean anything or nothing. It does not bring to the mind of the purchaser that anything has been done to reduce the article by dilution below the standard mentioned in s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879. It does not bring to his mind the fact that dilution has taken place by the addition of 3·7 per cent. of water to rum 25 degrees under proof. In my opinion, in order to protect himself from conviction the seller must give a notice such as to tell the purchaser the fact that there has been such a tampering with the spirit as is expressed by the word "dilution," and it is not sufficient to put up a notice that the spirits will not be of any guaranteed strength.

LORD ALVERSTONE C.J. I agree with the judgment delivered by Ridley J. If we accepted this notice as sufficient we should

(1) 10 Q. B. D. 518.

1906

DAWES v. WILKINSON.

Lord Alverstone C.J.

be opening the door to a very dangerous practice. As long as spirits are allowed by law to be sold, a purchaser of them is entitled to as much protection as the purchaser of any other article. The strength of spirit is one thing, the dilution of it another. The Legislature recognized that fact in enacting s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879, which in effect says that rum is not to be treated as diluted if the admixture of water has not reduced it more than 25 degrees under proof. The purchaser is therefore entitled to believe that he obtains spirit of at least that standard in the absence of a sufficient notice to the contrary. Is it sufficient to put up a notice that the spirits are not of any guaranteed strength? There are decisions upon notices in which the word "diluted" has been used in connection with the sale of spirits. In *Sandys* v. *Small* (1) the notice contained the word "mixed," in *Gage* v. *Elsey* (2) the word "diluted," and in *Palmer* v. *Tyler* (3) the word "diluted." In the present case the notice merely tells the purchaser that the spirits are of no guaranteed strength and omits all reference to the fact that they are diluted. We should be opening the door to a dangerous practice if we held that the words "not of any guaranteed strength" included dilution below the strength allowed by law.

Appeal dismissed.

Solicitors for appellant: *Indermaur & Brown, for Clifford & Cliffords, Derby.*

Solicitors for respondents: *Sharpe, Parker & Co., for Trevelyan Lee, Town Clerk, Derby.*

(1) 3 Q. B. D. 449. (2) 10 Q. B. D. 518.
(3) (1897) 61 J. P. 389.

J. E. A.

METROPOLITAN WATER BOARD *v.* PAINE.

1906

Nov. 8, 9.

London—Water—Supply of Water by Meter—"Premises"—Land used for Building Operations—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 43—*East London Waterworks Act*, 1853 (16 & 17 *Vict. c. clxvi.*), *s.* 79.

The word "premises" in s. 79 of the East London Waterworks Act, 1853, does not include land upon which the owner and occupier proposes to conduct building operations. Therefore the East London Waterworks Company are not liable to conviction under s. 43 of the Waterworks Clauses Act, 1847, and s. 79 of the Act of 1853, for neglecting to afford to the owner or occupier of the land a supply of water by meter for purposes other than the purposes in respect of which water rates are, by the Act of 1853, provided or limited.

Case stated by a metropolitan magistrate.

An information was laid by the respondent Paine against the appellants for having on April 10, 1906, neglected to afford and supply to him at his request at Moresby Road, Upper Clapton, for purposes other than the purposes in respect of which water rates are by the East London Waterworks Act, 1853, provided or limited, a supply of water by meter or other fit and sufficient instrument or mode for measuring and ascertaining the quantity of water as supplied, contrary to s. 79 of the East London Waterworks Act, 1853 (1), and s. 43 of the Waterworks Clauses Act, 1847. (2)

(1) The East London Waterworks Act, 1853, s. 78, provides: "That the company may supply any person or body within their limits with water to be used within such limits for other than domestic purposes, at the rate and upon the terms and conditions agreed upon between the company and the person or body requiring such supply."

Sect. 79 provides: "That the company may, at their own instance, and shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the company is or shall be laid, and who requires a supply of water by measure for purposes other than the purposes in respect of which rates are by this Act provided or limited, and by means of communication pipes and other necessary and proper apparatus, to be provided, laid, and maintained at the cost of the person requiring such supply, afford a supply of water by meter or other fit and sufficient instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply not

(2) For note (2) see next page.

1906

METROPOLITAN WATER BOARD v. PAINE.

The respondent was the owner and occupier of a piece of land adjoining Moresby Road, Upper Clapton, which was a street (substantially running from west to east) in which a water main had been laid by the East London Water Company, the predecessors of the appellants. This piece of land had been until somewhat recently the site of a dwelling-house and the garden and pleasure ground appurtenant thereto. The dwelling-house had prior to April, 1906, been removed, and its site, together with the garden and pleasure ground, had been laid out by the respondent for building purposes.

Prior to April, 1906, the respondent had erected upon the piece of land ten houses, eight of which faced and abutted on Moresby Road, having yards or gardens at the back of them. A considerable portion of the rest of the piece of land had been marked out by the respondent for building houses upon or for a continuation of the line of houses of which the above-mentioned eight houses were to be a part, and on April 10, 1906, the foundations of several of these houses had been laid and built in. Except for the marking out of the foundations mentioned and

---

exceeding the following rates for every one thousand gallons; to wit:

"In respect of ordinary service: When the quarterly consumption of water does not exceed fifty thousand gallons, ninepence: . . . .

"And in respect of high service: An additional rate not exceeding twenty-five per centum upon those several rates for ordinary service:

"Provided always, that the company shall not be required so to supply water in any less quantity than twenty-five thousand gallons in any quarter of a year."

(2) By s. 43 of the Waterworks Clauses Act, 1847: "If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fire plugs, or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid, upon such terms as shall have been agreed on or settled as aforesaid, or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

a pit from which sand and gravel for use in the building operations was being dug, the piece of land where not built upon was on April 10, 1906, a garden or pleasure ground, with shrubs and fruit trees growing thereon.

The respondent, wishing for a supply of water from the main laid in Moresby Road for use in continuing his building operations upon the piece of land, on April 3, 1906, in writing requested the appellants to supply him upon the piece of land at a point in the same (not built upon) about thirty feet south of the centre of Moresby Road, and distant 500 feet from Upper Clapton Road (which crosses the western end of the Moresby Road at right angles to it), with 25,000 gallons of water within the next quarter of the year by measure; and with this request the respondent offered to the appellants the sum of two guineas in payment of the maximum price of the water as fixed by s. 79 of the East London Waterworks Act, 1853, being at the rate of 9*d.* per 1000 gallons, and in payment of the cost of laying and maintaining the communication pipes and other necessary and proper apparatus for the supply from the water main in Moresby Road to the piece of land. It was admitted that the sum of two guineas was sufficient, though not the exact sum to cover the cost of 25,000 gallons of water at 9*d.* per 1000 gallons and the cost of laying and maintaining the communication pipes and other necessary and proper apparatus for the supply of water from the main to the place where the respondent required it.

The appellants neglected to afford a supply of water by measure to the respondent as requested by him.

It was contended on behalf of the appellants (inter alia) that no offence had been committed by them, because the respondent was not entitled to receive a supply of water by measure, as the place at which he requested the supply was not "premises" within the meaning of the word as used in s. 79 of the East London Waterworks Act, 1853, which was the section under which the respondent claimed his right to the supply.

The magistrate held that the piece of land adjoining Moresby Road, at which the respondent requested to be supplied with water by measure, was "premises" within the meaning of s. 79

1906

METRO-POLITAN WATER BOARD v. PAINE.

of the East London Waterworks Act, 1853, and that, in offering to the appellants a sum sufficient to cover the cost of the 25,000 gallons of water and the cost of laying and maintaining the communication pipes and other necessary and proper apparatus for the supply of water from the water main in Moresby Road to the said piece of land, the respondent had complied with the requirements of s. 79 of the East London Waterworks Act, 1853, and s. 43 of the Waterworks Clauses Act, 1847. He therefore convicted the appellants. The question for the opinion of the Court was whether the decision of the magistrate was right in law.

Avory, K.C., and *H. Courthope-Munroe*, for the appellants. The word "premises" in s. 79 of the East London Waterworks Act, 1853, does not include or relate to an open piece of ground on which a builder is proposing to conduct building operations. The section only entitles a person who already has a domestic supply at a house or part of a house to demand a supply for other purposes, such as a garden, at the specified rates. The section is limited to the case of a person who already has a supply and is in occupation of a house. The respondent ought to have obtained his supply under s. 78 of the East London Waterworks Act, 1853, which provides that water for other than domestic purposes may be supplied by agreement. The persons who come under s. 79 are the ordinary shopkeeper or the ordinary man who already has a supply for domestic purposes at his business premises. Assume that a man has business premises, a soda-water manufacturer or anybody else. He must have business premises, but he has a domestic supply for the purpose of those premises. If he wants water for the purpose of manufacturing soda-water, then he comes under s. 79. That is quite a reasonable construction. Water may be supplied to a garden attached to a house or to land attached to a house for trade purposes, and s. 83 merely gives the power to officers of the company to enter any house, building, or lands supplied by the company by measure. In s. 48 of the Waterworks Clauses Act, 1847, the word "premises" is used as interchangeable with "dwelling-house" or "part of a dwelling-house." That section

gives an indication of the meaning of the word "premises" in the East London Waterworks Act, 1853. Under s. 79 of the Act of 1853 the communication pipe is to be provided by the person making the application. Sect. 79 in the Act of 1853 corresponds to s. 48 in the Act of 1847, under which the owner or occupier may lay the communication pipe, and in that section the word "premises" is used interchangeably with "dwelling-house." Sect. 43 of the Waterworks Clauses Act, 1847, does not apply to a supply by meter. That section was only intended to make it a penal offence for the company to refuse to continue the supply for domestic purposes where the water rate is paid for that purpose, and it has no application to a special or extra supply under s. 79 of the Act of 1853. The remedy may be by action or mandamus, but it is not given by s. 43 of the Act of 1847.

The principles laid down by Lord Herschell in giving judgment in *Cooke, Sons & Co.* v. *New River Co.* (1), apply to the present case. Sect. 41 of the New River Company's Act, 1852 (15 & 16 Vict. c. clx.), upon the construction of which the decision in that case turned, although not identical, is in substance the same as s. 79 of the East London Waterworks Act, 1853. The basis of that decision was that it could never have been intended that any person in the general sense should be entitled to demand a supply by meter. Lord Herschell says that the class of persons entitled to demand the supply must be limited, and he gives as a reason for that opinion the existence of s. 40 of the New River Company's Act, 1852, which exactly corresponds with s. 78 of the East London Waterworks Act, 1853.

Lord Herschell's judgment applies to s. 78 of the East London Waterworks Act, 1853. If s. 79 of that Act applies to every person within the limits of supply the effect is that s. 78 of the Act is nugatory. In s. 3 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), the term "premises" is defined to "mean and include any dwelling-house and any part of a dwelling-house, and any stable, yard, or other offices used together or in connection with any dwelling-house or any part of a dwelling-house"; and by the same section the term "company" includes

(1) (1889) 14 App. Cas. 698.

1906

METRO-POLITAN WATER BOARD v. PAINE.

among others the East London Waterworks. The definition there given ought to be adopted, otherwise there is a conflict between ss. 78 and 79 of the East London Waterworks Act, 1853. All the provisions of the Act of 1871 apply to the East London Waterworks. Although it is quite true that in s. 43 of the Waterworks Clauses Act, 1847, the word "rates" may by the definition clause include any payment which is made for water, looking at the whole of the words of s. 43 of the Act of 1847, it is obvious that the words "any part of the time for which the rates for such supply have been paid or tendered" do not apply to a case where a person has made a payment of a lump sum for a specific quantity of water such as 25,000 gallons. Sect. 43 of the Act of 1847 obviously applies to the case of a person who has a continuous supply during the quarter.

[Sect. 44 of the Waterworks Clauses Act, 1847, and ss. 72, 74, of the East London Waterworks Act, 1853, were also referred to.]

Danckwerts, K.C., and *R. M. Montgomery*, for the respondents. The judgment of Lord Macnaghten in *Metropolitan Water Board* v. *New River Co.* (1) shews that these special Acts ought to be construed strictly against the parties obtaining them, but liberally in favour of the public. *Cooke, Sons & Co.* v. *New River Co.* (2) has no bearing upon the question. It merely decided that a person who is desirous of being a consumer of water is not a consumer of water within the meaning of s. 41 of the New River Company's Act, 1852. Sect. 78 of the East London Waterworks Act, 1853, was required in order to provide for the case where no pipe had been laid in the street, or where water was supplied in bulk, and in other instances. In those cases the company required statutory power to enable it to enter into an agreement for the supply. The class of persons who are entitled to demand a supply under s. 79 is limited to the owners or occupiers of premises situated in or adjoining any street in which there is a main. Under s. 79 it is the duty of the appellants to lay the communication pipe and to recover the cost from the person requiring the supply. There is no reason for placing any limitation on the word "premises." It is clear that that word covers both land and buildings, for by s. 83 of the

(1) (1904) 20 Times L. R. 687. (2) 14 App. Cas. 698.

East London Waterworks Act, 1853, the officers of the company may enter any house, building, or lands supplied by the company by measure.

The supply by the company by measure is dealt with by s. 79 of the Act of 1853. It follows that s. 83 of that Act is co-extensive with s. 79, and that the word "premises" in s. 79 includes lands for which a supply of water is required. The interpretation of the Metropolis Water Act, 1871, throws no light upon the interpretation of the East London Waterworks Act, 1853, passed nearly twenty years before. The definitions of "premises" in Sweet's Law Dictionary and Wharton's Law Lexicon shew that the word includes land. So also does the definition in Johnson's Dictionary. It follows that gardens are included in the term. If not, persons who require water for gardens, unless connected with houses, will have no right to compel a supply of water, but will be at the mercy of the company by being driven to make an agreement under s. 78 of the East London Waterworks Act, 1853. Sect. 83 of that Act contemplates meters being brought upon lands, and in the case of lands where the water is supplied by measure, the meters are by s. 82 privileged from distress. But, if the water is supplied by agreement, the meters on land would not be exempt from distress; and it is therefore in the interests of the appellants themselves that the word "premises" in s. 79 of the Act of 1853 should be construed as including lands.

[*Sheffield Waterworks Co.* v. *Brooks* (1) was also referred to.]

Courthope-Munroe, in reply. The questoin is not what certain dictionaries say is the meaning of the word "premises" in particular cases, but what the meaning of the word is in s. 79 of the East London Waterworks Act, 1853.

In legal language "premises" means the subject or thing previously expressed: *Beacon Life and Fire Assurance Co.* v. *Gibb.* (2) There is no provision in the East London Waterworks Act, 1853, compelling the company to lay the communication pipes. Sect. 3 of the Act of 1853 incorporates the Waterworks Clauses Act, 1847, except the provisions with respect to the communication pipes to be laid by the undertakers.

(1) (1882) 8 Q. B. D. 632.
(2) (1862) 1 Moo. P. C. (N.S.) 73; 7 L. T. 574.

1906

METRO-POLITAN WATER BOARD v. PAINE.

LORD ALVERSTONE C.J. This case raises a question of very great importance and difficulty, but in my opinion the decision of the magistrate cannot be supported. The appellants were summoned under s. 43 of the Waterworks Clauses Act, 1847, which provides that "if . . . . the undertakers neglect . . . . to fix, ... or repair such fire-plugs, ... or if . . . . they neglect to keep their pipes charged, ... or neglect or refuse to supply to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds. . . ."

A good deal of the argument which has been addressed to us does not, in my opinion, touch the point we have to consider. That is whether or not the respondent was an owner or occupier "entitled under this or the special Act to receive a supply of water"—that is, the supply of water by meter.

I postpone for the present the consideration of arguments that have been used in reference to the particular meaning of certain words, and I proceed to deal with the question whether the respondent is a person so entitled. The facts are that he is the owner of a large plot of land, that he had certain houses upon that land which were being supplied and as to which there is no doubt that he was entitled to a supply of water. I mention that because, although it is not the real ground of the decision of the magistrate, he seems to have thought that the case for the respondent was in some way supported or assisted by the fact that he had other premises in the street, and had had a supply of water, but I do not understand that that was the real ground upon which the magistrate based his judgment, nor has it been relied upon by counsel on behalf of the respondent. On behalf of the respondent it was contended that s. 43 of the Waterworks Clauses Act, 1847, entitles the owner of land, in or adjoining a street, to insist that he shall receive the supply of water he asks for under s. 79 of the East London Waterworks Act, 1853, and in my judgment that is the only logical way in which this case can be argued. The question is whether the respondent is a person "entitled under . . . . the special Act to receive a supply"—it is not suggested that he is entitled under

the general Act—in other words, is he within s. 79 of the East London Waterworks Act, 1853? On behalf of the respondent we were pressed to say that the word "premises" in this section includes bare land if the section is construed as it ought to be, i.e., fairly but strictly against the promoters, inasmuch as it was one of the terms on which they obtained the special Act. In the first place, the broad observation occurs to me that "houses" and "land" and "land in a street," being not only well-known terms, but terms commonly used at the date the East London Waterworks Act, 1853, was passed, in many Acts in pari materia, and the terms "houses" and "lands" being so well known in contradistinction to one another, if it had been intended to say that by the Act of 1853 the company were to be bound to supply water by measure to any person who chose to put up a pipe in his field or bare land, I think that it would have been clearly enacted. On behalf of the respondent s. 83 of the East London Waterworks Act, 1853, was relied upon as giving a power of entry upon houses, buildings, or lands supplied by the company by measure in order to inspect the meters. That section cannot extend the meaning of the word "premises." It gives the right of entry where the appellants are in fact supplying, and gives that right of entry either on the house, building, or lands where the meter may be fixed, and under ordinary circumstances the meter would be fixed on land. I am of opinion that the word "premises" in s. 79 of the East London Waterworks Act, 1853, means any premises to which water could be supplied for domestic purposes, or trade premises; in other words, there must be some existing premises in the popular sense of the word. That that is the meaning is, I think, shewn by the words "owner or occupier of any premises situate in or adjoining any street who requires a supply of water by measure for purposes other than the purposes in respect of which rates are by this Act provided or limited." I apply to that section the same kind of line of reasoning as was used by Lord Herschell in dealing with a different set of words in *Cooke, Sons & Co.* v. *New River Co.* (1) That case is not an authority on the question we have to decide, but as far as it has any bearing

(1) 14 App. Cas. 698.

1906

METRO-POLITAN WATER BOARD v. PAINE.

Lord Alverstone C.J.

it rather helps the respondent, but in my judgment it only affords an illustration of the way in which somewhat general words in these special Acts of Parliament may have to be construed. Adopting that line of reasoning, I think that the sections of the East London Waterworks Act, 1853, difficult as they are, can be read reasonably and consistently. Sect. 74 requires "the company . . . . at the request of the owner or occupier of any house or part of a house occupied as a separate tenement in any street within their limits in which any main or service pipe of the company is or shall be laid, or of any person who under this Act shall be entitled to demand a supply of water for domestic purposes," to "furnish to such person, by means of communication pipes and other necessary and proper apparatus to be provided, laid down, and maintained at the cost of such person, a sufficient supply of water for his domestic purposes at a rate per centum per annum on the annual value of the house not exceeding five pounds." I do not think it makes much difference whether the appellants are, or the consumer is, bound to lay the pipe. I refer to s. 74 of the Act of 1853 for the purpose of shewing that in that section the words are "occupier of any house or of any part of a house . . . . in any street within their limits . . . . or of any person who under this Act shall be entitled to demand a supply of water for domestic purposes." Sect. 75 gives the rate; s. 76 the additional rate for high service; s. 77 the limit of one dwelling-house for each communication pipe; s. 78 is a mere agreement section; s. 79 an additional compulsory section. I think the fair meaning of s. 79 is that a person who has premises in a street in which water can be used either for domestic purposes, or for purposes other than those which are covered by rate, is entitled to have water by rate measure to those premises at not exceeding the maximum amount. To construe the word "premises" in that section as meaning land would, in my judgment, involve consequences so far-reaching and so serious, that I cannot think the Legislature meant to apply those compulsory powers to the owner or occupier of bare land when they used the word "premises" in this section. I wish to add that I do not attach much importance to the other sections in which the word

"premises" has been used, because each section must be looked at in order to ascertain what it says. For instance, on behalf of the appellants, it was pointed out that the word "premises" in s. 48 of the Waterworks Clauses Act, 1847, was used as equivalent to "dwelling-house" or "part of a dwelling-house." But the whole strength of that observation as an argument in favour of the appellants was cut away by the fact that the words contained in the section are "dwelling-house," "part of a dwelling-house," "premises," and "such premises," shewing that in that particular section the word "premises" is used as equivalent to "dwelling-house" or "part of a dwelling-house," because the section is dealing with a dwelling-house or part of a dwelling-house.

Again, s. 3 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), enacts that the word "premises" shall mean and include any dwelling-house and any part of a dwelling-house, and it is, I think, solely for the purpose of that Act that that definition is useful. All that can be said is that in these Waterworks Acts it cannot be assumed that wherever the term "premises" is used it means bare land. Each particular section must be looked at in order to ascertain its particular subject-matter. In this case I think it would be going too far to say that in s. 79 of the East London Waterworks Act, 1853, the word "premises" includes bare land. I only wish to refer to one other matter in order that it may not be thought that I have overlooked it. I am not at all sure that the magistrate could convict merely because the consumer had tendered the cost of the communication pipes and other apparatus necessary for the supply. On behalf of the respondent it was suggested that s. 79 of the East London Waterworks Act, 1853, means that the company shall lay the pipes and recover the cost from the person requiring the supply, but I am not at all satisfied that that is what the section means, although I know that the ordinary way in which the matter works out is that the company for their own safety and protection lay the communication pipes and charge the cost to the consumer; but we are dealing with a penal section, and I am by no means satisfied that a person is entitled to demand a supply who has not himself laid a communication pipe, or exercised his right

1906

METRO-POLITAN WATER BOARD v. PAINE.

(if he has it) of having it laid by the company. I therefore come to the conclusion that the word "premises" in s. 79 of the East London Waterworks Act, 1853, does not include this bare land. This appeal must be allowed.

RIDLEY J. I am of the same opinion. The question we have to decide is somewhat difficult in the absence of a clause in the East London Waterworks Act, 1853, defining the word "premises:" and if there had been such a definition clause, it would have been somewhat difficult, I think, to apply, having regard to the manner in which the statute of 1853 has been drawn. I think there is ground for coming to the conclusion that the word "premises" in s. 79 of the Act of 1853 is equivalent to the phrase "houses" which is used in other sections of the Act, and includes houses and buildings. When a definition clause is used in a statute the word is used consistently throughout. For instance, in s. 3 of the Waterworks Clauses Acts, 1847, the word "lands" has a definition for the purposes of the Act, and it is made to include messuages, lands, tenements and hereditaments, or heritages of any tenure. It is impossible to say that "lands" in the ordinary popular sense of the word would include either messuages or tenements; so that if the method of definition is used a very artificial meaning may be given to any particular word. In the East London Waterworks Act, 1853, that was not the course pursued, and therefore it becomes necessary to ascertain whether the word "premises" in s. 79 of the statute means land. With the reasons my Lord has given based upon the general scope of the Act of 1853 I entirely agree. I think that the word "premises" means such buildings, houses, or offices (whatever hey may be) as are already supplied with a main or service pipe for the purposes for which a water rate is paid. If the wider definition contended for by counsel on behalf of respondent be given to the word, it seems to me that that meaning would be foreign to the purpose of the Act. I do not wish to say more, or to enlarge upon the reasons my Lord has given; but as to the popular sense of the word I desire to say this: I entirely accept the authority of the law dictionaries which have been quoted on behalf of the respondent; but they do not give the legal meaning

1906

METROPOLITAN WATER BOARD v. PAINE.

Ridley J.

of "premises." The strict legal meaning of the word "premises" is simply "that which comes before": the "præmissa" of the document or deed which includes that word. I find in Sheppard's Touchstone, 7th ed. pp. 74 et seq., a book of greater authority than either of the law dictionaries that have been quoted (it has the names of two of the most eminent lawyers of that and previous times on the title page, and has constantly been accepted by the Courts as an authority), the word "premises" is treated as having this meaning only. There is a very long chapter defining "lands," "hereditaments," and every word which occurs in a grant, but there is not one syllable about the word "premises" as an operative word of grant. I therefore think that the word "premises" in its strict and primary meaning does not mean "land," nor does it mean anything except that which goes before. It is true that this word is not used in s. 79 of the East London Waterworks Act, 1853, in the conveyancing and original sense. It is used, no doubt, in something approaching the popular sense of the word, and I think "premises" may in that sense include the word "land," as is stated in the dictionaries; but for the reasons given I do not think it does so in this section. I therefore agree that the decision of the magistrate was wrong and that this appeal must be allowed.

DARLING J. I agree.

Appeal allowed.

Solicitor for appellants: *Walter Moon.*

Solicitors for respondent: *Sharpe, Parker, Pritchards, Barham, & Lawford.*

J. E. A.

1906
Nov. 1.

THE KING *v.* CARTER AND ANOTHER (JUSTICES).

Licensing Acts—Compensation Fund—Relief from Maximum Charge—Hotel—Premises used for a Purpose to which the holding of a Licence is Auxiliary—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *Sched.* I.

By s. 43 of the Inland Revenue Act, 1880, the duties payable on licences to retailers of spirits are fixed, and by sub-s. 4, in the case of premises of the value of 50*l.*, which are structurally adapted for and mainly used as an inn or hotel for the reception of guests and travellers, the duty is not to exceed 20*l.*, but this relief is not to be given if any portion of the premises is set apart and used as an ordinary public-house and the annual value of that portion exceeds 25*l.* By Sched. I. of the Licensing Act, 1904, the maximum rate of charge upon licensed premises as a contribution to the compensation fund for the extinction of licences is fixed, and relief is given in the case of a hotel or other premises to which s. 43, sub-s. 4, of the Act of 1880 applies, and also in the case of any licensed premises certified by the licensing justices to be used " . . . . for any other purpose to which the holding of a licence is merely auxiliary ":—

Held, that the holder of the licence of a hotel of the annual value of 450*l.*, a portion of which, exceeding 25*l.* in annual value, was set apart as a public bar and used as an ordinary public-house, was not entitled to relief from the maximum charge to the compensation fund, as the holding of a licence was not merely auxiliary to the business of such a hotel.

ORDER nisi calling upon the respondents, who were justices of the borough of Bedford, to shew cause why a writ of certiorari should not issue to remove into the High Court for the purpose of being quashed a certificate made by them at an adjourned general annual licensing meeting under the note to Sched. I. of the Licensing Act, 1904, on the ground that the certificate was granted in excess of, or without, jurisdiction.

By the certificate the justices certified that certain licensed premises, known as the Lion Hotel, were used for purposes to which the holding of a licence was merely auxiliary, and that they were of opinion that two-thirds of the rate charged in other cases was the proper rate of charge under the Licensing Act, 1904, in respect of those premises. (1)

(1) Orders nisi for a certiorari were also granted in respect of two other hotels, but were not separately argued, the point in all three cases

It appeared from the affidavits that at the adjourned general annual licensing sessions held on March 2, 1906, an application was made on behalf of Francis Hughes, the licensee of the Lion Hotel and premises, under the note to Sched. I. of the Licensing Act, 1904, for a certificate that the licensed premises were used only for purposes to which the holding of a licence was merely auxiliary, and to fix the rate of charge payable under s. 3 of the Act at such sum, not less than one-third of that charged in other cases, as the justices should think proper under the circumstances. (1) The licensed premises comprised a house containing twenty-seven bedrooms, with dining, coffee, commercial,

---

being the same. There were also in all the cases alternative orders nisi for a mandamus to hear and determine.

(1) Sect. 3 of the Licensing Act, 1904 (4 Edw. 7, c. 23), gives power to quarter sessions to impose, in respect of all existing on licences renewed in respect of premises within their area, charges not exceeding the scale of maximum charges set out in Sched. I. of the Act; these charges are paid into the compensation fund for payment of compensation on non-renewal of licences.

By Sched. I. the maximum rate of charge where the annual value of premises, taken as for the purpose of the publican's licence duty, is 400*l.* and under 500*l.*, is 50*l.* The note to the schedule is as follows: "The rate of charge in the case of an hotel or other premises, to which sub-s. 4 of s. 43 of the Inland Revenue Act, 1880, applies, shall be one-third of that charged in other cases, and, in the case of any licensed premises which are certified by the justices of the licensing district on the application of the holder of the licence to be used only as public gardens, picture galleries, exhibitions, places of public or private entertainment, railway refreshment-rooms, bona fide restaurants or eating-houses, or for any other purpose to which the holding of a licence is merely auxiliary, such rate, not less than one-third of that charged in other cases, as the justices think proper under the circumstances."

By the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), s. 43, the duties on licences to retailers of spirits are fixed, and sub-s. 4 provides as follows: "Where in the case of premises of the value of fifty pounds or upwards it shall be proved to the satisfaction of the Commissioners that the premises are structurally adapted for use as an inn or hotel for the reception of guests and travellers desirous of dwelling therein, and are mainly so used, the amount of duty to be paid on a licence to retail spirits shall not exceed twenty pounds. Provided that the relief under this sub-section shall not be given in case any portion of the premises is set apart and used as an ordinary public-house for the sale and consumption therein of liquors, and the annual value of such portion, in the opinion of the Commissioners, exceeds twenty-five pounds."

1906

REX v. CARTER.

reading, smoking, and other rooms for the reception and use of guests and travellers desirous of dwelling therein, with extensive yards and stabling. In addition to these there were certain portions of the premises, consisting of two separate public bars with a bar-room to each, one of which bars had an approach from the street through the hotel and also an approach from the street gateway entrance, and the other had an approach from the same street gateway entrance; these bars were set apart and used as an ordinary public-house for the sale and consumption therein of liquors which were sold to and consumed by members of the public other than guests or travellers. The annual value of the whole of the premises for the purposes of the publican's licence duty was 450*l.*, and the full amount of the licence duty was paid; the annual value of the portions set apart and used as an ordinary public-house was 60*l.*

At the conclusion of the hearing the justices granted a certificate in which they certified that the premises were used for purposes to which the holding of a licence was merely auxiliary, and that they were of opinion that two-thirds of the rate charged in other cases was the proper rate of charge under the Licensing Act, 1904, in respect of the premises. The clerk of the peace for the county of Bedford, being as such the clerk of the compensation authority for the quarter sessions area of that county for the purposes of the Licensing Act, 1904, thereupon applied for and obtained this order nisi.

F. E. Smith, for the justices, shewed cause. The justices were right in finding that the premises were used for a purpose to which the holding of a licence was merely auxiliary. It is wrong to say that a hotel can only come within the note to Sched. I. of the Act of 1904 if it also comes within s. 43, sub-s. 4, of the Act of 1880, and that it is only entitled to relief where the annual value of the public bar or bars attached to it does not exceed 25*l.* The object of the two Acts was wholly different; that of s. 43, sub-s. 4, of the Act of 1880 was to determine the scale of licence duties for revenue purposes, while Sched. I. of the Act of 1904 determines the amount of charge on licensed premises towards the compensation fund for the extinction

1906

REX v. CARTER.

of licences. The Act of 1880, by s. 43, sub-s. 4, fixed a convenient limit of exemption in the case of small hotels; this limit was incorporated by reference in the note to the schedule of the Act of 1904, which then proceeds to give large relief in the widest general language to any licensed premises certified by the licensing justices to be used for certain specified purposes. There is no reason why the larger class of hotels should not come within the language of the note to the schedule, there being power in the justices to fix a discretionary rate.

[LORD ALVERSTONE C.J. When the Legislature mentioned restaurants and eating-houses, why did they not go on to mention hotels?]

No doubt they might have done, and the case for the licence-holder would then have been unanswerable; but the language actually used is sufficiently wide to include ordinary hotels: they are licensed premises, and it is for the other side to shew why they do not come within the note to the schedule. If the contention of the other side is right, the result will be that the largest charge will be imposed upon the largest hotels, which are precisely the establishments that benefit least from the suppression of a public-house.

Danckwerts, K.C. (*Stimson* with him), in support of the rule. The licence-holder is not entitled to relief from the full charge under the note to the schedule of the Act of 1904. There is a specific mention of hotels in the first branch of the note, and those hotels are entitled to relief; they are those described as hotels to which s. 43, sub-s. 4, of the Act of 1880 applies, that is, hotels not having a public bar of an annual value exceeding 25*l.* In view of the specific mention of this class of hotels, it cannot be supposed that the Legislature intended to bring all other hotels within the last branch of the note (where hotels are not directly mentioned) as places used only for purposes to which the holding of a licence is merely auxiliary. The intention of the Legislature was that a hotel should have no right to relief if it was in fact partly conducted as a public-house of an annual value exceeding 25*l.* It cannot be successfully contended that a licence is merely auxiliary to the purpose for which an ordinary hotel is conducted; the holding of a licence is an essential part

1906

REX v. CARTER.

of the business of such a hotel. It should be noticed that the note to the schedule requires that the justices shall certify that the premises are used "only" for the purposes described, and the form of certificate given in form 25 of the Licensing Rules, 1904, expressly says that the justices certify that the licensed premises are used "only" as, &c. In the present case the word "only" is omitted from the certificate, and it must be presumed that the justices abstained from inserting the word because they did not think that the premises were "only" so used; the certificate is therefore bad on its face.

LORD ALVERSTONE C.J. This case to my mind presents very considerable difficulties, and if it depended upon authority or upon any matters from which I could get further light by examination or consideration, I should certainly have taken time to consider my judgment, but, the case being one of construction of the statute only, I prefer to give my reasons while the very clear arguments are fully present to my mind.

Upon the whole I have come, but with doubt, to the conclusion that these rules must be made absolute. I attach no importance to the absence of the word "only" in the certificate. In answer to a question from me the learned counsel who supported the rule very properly said that he did not wish the case to be decided upon such a point; but his argument falls to the ground when form 25, made under the Licensing Act, 1904, is considered. The framers of that form were obviously thinking of the second branch of this clause in the schedule, for the form says, "certify that the licensed premises specified below are used only as (state whether public gardens, picture galleries, or as the case may be)." It is plain that they were not attempting to frame an exhaustive form which could be used in every case.

To come to the substantial matter, namely, whether hotels are entitled to exemption. That question depends upon whether they can be brought within the third class of premises mentioned in the note to Sched. I. of the Act of 1904, namely, "licensed premises which are certified by the justices of the licensing district on the application of the holder of the licence to be used . . . . for any . . . . purpose to which the holding of a licence

is merely auxiliary." Speaking of this kind of establishment at the present day, I think that but for the distinction founded upon s. 43, sub-s. 4, of the Inland Revenue Act of 1880, no person would say with regard to an ordinary hotel that the holding of a licence was merely auxiliary to the purpose for which the hotel was used. I should have thought that, having regard to the fact that such a large number of ordinary hotels are licensed, and that boarding-houses, temperance hotels, and other institutions which are not licensed are the exception and not the rule, it would be thought by the Legislature that the holding of a licence was not only not merely auxiliary, but was a very important part of the business of a hotel. That argument must, to a certain extent, be borne in view when we are considering the three branches of the note to the schedule, and we must remember that hotels are mentioned in the first branch. I do not like to attach much importance to the inclusion of a particular word in one clause and to its omission from other clauses, because I appreciate the difficulty of drafting bills, and know that words are sometimes inserted and sometimes left out without any intention on the part of the draughtsman to make the inclusion or exclusion of any particular word the basis of a legal argument. But the particular subject-matter must be looked at as a whole, and in this particular case the omission of the word "hotel" from the later branches of the note is of importance.

When the Act of 1904 was passed s. 43, sub-s. 4, of the Inland Revenue Act, 1880, was operative to the knowledge of the Legislature; this is apparent on the face of Sched. I. That section gave to hotels above the value of 50*l.*, which were structurally adapted and mainly used as "an inn or hotel for the reception of guests and travellers desirous of dwelling therein," the privilege of a less rate of payment in respect of certain duties, the amount being limited to 20*l.* instead of an ad valorem duty on the annual value; but this privilege was subject to the condition that the annual value of the portion of the premises set apart and used as an ordinary public-house for the sale and consumption of liquors should not exceed 25*l.* When Parliament were considering the Licensing Act, 1904, they were minded to grant certain

1906

REX v. CARTER.

Lord Alverstone C.J.

exemptions, and accordingly, after providing by s. 3, sub-s. 1, that quarter sessions should impose, in respect of all existing on licences renewed in respect of premises in their area, charges or rates not exceeding the scale, they gave the directions comprised in the note to Sched. I. with regard to the application of that scale. The first class of premises there mentioned is the class of licensed premises which are entitled to the protection of s. 43, sub-s. 4, of the Act of 1880. It is agreed that that class is restricted to cases where the bar, or the public-house part of the premises, or, to use the exact words of sub-s. 4, "the premises set apart and used as an ordinary public-house for the sale and consumption therein of liquors," are of an annual value not exceeding 25*l.*; such premises are to have the benefit of a rule which cuts down their rate of charge to one-third of that which would be charged in other cases, and I am very much pressed by Mr. Smith's argument that if that class of premises is entitled to the benefit of an exemption which reduces its contribution to one-third, one might well expect an exemption to a less degree to be given in respect of hotels where the value of the part of the premises used exclusively as a public-house is above the value of 25*l.* I was for a time impressed by the contention that the scale should be treated as a graduated scale, so that, although the licence-holder might not be entitled to the full reduction of two-thirds, he might get some protection if he was fairly within the language of the two succeeding branches of the note. The second branch of the note deals with "any licensed premises which are certified by the justices of the licensing district on the application of the holder of the licence to be used only as public gardens, picture galleries, exhibitions, places of public or private entertainment, railway refreshment-rooms, bona fide restaurants or eating-houses." There is no difficulty in dealing with public gardens, picture galleries, exhibitions and places of public or private entertainment; they are all places where people, being attracted by the particular entertainment, require some refreshment before leaving; it is easy to see why such places should be subject to a lower rate of charge. Perhaps the same observation applies to railway refreshment-rooms, which are provided for travellers of all descriptions, some of whom

want refreshments other than intoxicating liquors, while others do not. I have felt grave difficulty with regard to "bona fide restaurants or eating-houses," because to a very large extent their business is more closely connected with the sale and consumption of excisable liquors than the ordinary business of hotels. The only reason I can think why they were put in is that people go to them for refreshment, not necessarily for excisable liquors, and they are therefore named as being entitled to consideration by the justices.

Coming to the third branch, under which the licence-holder naturally contends that he comes—"any licensed premises used for any other purpose to which the holding of a licence is merely auxiliary"—can those words be fairly construed as including hotels? I do not adopt the argument that the word "only" should be applied to the words "used for any other purpose," and I do not, as I have already said, decide on the ground that the certificate does not contain the word "only." I doubt very much whether the word "only" was meant to be inserted in that place with that meaning, but the language seems to me to point to a user for a different class of purpose than that which has been already specifically dealt with under the names of "hotel," "restaurant," and "eating-house"; and I am, to a certain extent, impressed by the general argument that has been based upon s. 43, sub-s. 4. The contention is that where there is a hotel with so large a part of its premises used for the purposes of an ordinary public-house a line must be drawn somewhere, and, the line being drawn at 25*l.*, the Legislature must have considered that, at any rate for the purposes of the Act of 1880, a hotel where the 25*l.* limit was exceeded was not entitled to protection. It may well be that the user of a portion for the purpose of a public-house affects the premises to such an extent that they ought not to have any exemption. For that reason, as well as for those which I have already stated, I think that if, after mentioning "hotel" in the earlier part, the Legislature had intended to bring any hotel under the last part of the note, some more clear indication of the purpose would have been afforded. I think the words "any other purpose to which the holding of a licence is merely auxiliary" are

1906

REX v. CARTER.

Lord Alverstone C.J.

not sufficient to allow us to include hotels, especially having regard to the fact that the class of hotels, which have a bar not exceeding 25*l.* in annual value, is mentioned in the earlier part of the note. Probably the Legislature adopted the view that there may be other similar purposes to which the holding of a licence is so auxiliary that premises used for such purposes ought not to be treated as being public-house premises at all. I fully appreciate the difficulties of the case and the weight of the arguments which have been addressed to us, but the best consideration which I can give to the matter will not enable me to say that this hotel, having an ordinary public-house attached to it of an annual value exceeding 25*l.*, comes within the exemption which would entitle the justices to impose a less rate of charge upon it than upon other premises. The rule must therefore be made absolute.

RIDLEY J. I have come to the same conclusion with great difficulty. I was at first impressed by the argument that the intention of the schedule was that, in the case of hotels above 50*l.* in value, but with a bar not exceeding 25*l.* in value, there was to be only one-third charged, and that these hotels were put aside and put into a separate list; but that all other hotels, if they came within the definition given to the words in the remaining part of the schedule, would be entitled, along with the other premises and places mentioned in the schedule, to such relief as the magistrates might think proper to give them—that is to say, that the hotels of the particular class which I have mentioned were placed in the first part of the schedule and other hotels which were not so included were placed in the other part. But I think, on consideration, that that is not a sound argument. I do not place any reliance on the contention that the word "only" is to be imported after the words "eating-houses," so as to read "or only for any other purpose"; that would be putting a false construction upon the language used. I think that, after specifying certain places, such as picture galleries, exhibitions, places of public and private entertainment, refreshment-rooms, restaurants, and so forth, and constituting such places a class, and using the word "only" with regard to them, the Legislature

went on to embrace in one comprehensive phrase places used for any other purpose for which the holding of a licence is merely auxiliary. It is not necessary to read the word "only" again in that place, but we have nevertheless to consider whether the words "any licensed premises used for any other purpose to which the holding of a licence is merely auxiliary" do include a hotel.

Prima facie, of course, the words "any licensed premises" include a hotel, and it may perhaps be argued, although I should have some hesitation in acceding to the contention, that a hotel is a licensed house or premises used for a purpose to which the holding of a licence is merely auxiliary in this sense, that, if we are to distinguish a hotel from what is commonly known as a public-house, there is this difference between them, that the licence, and the sale of the liquors under that licence, form, in the case of a public-house (which is subject to the Licensing Act, 1904), the main object of the existence of the premises, whereas in the hotel the licence is but an auxiliary, because in a hotel a great deal of other business is done, which can be and is done altogether independently of the licence, such as the lodging, boarding, and entertaining of the guests, and a variety of other matters. The same cannot be said with regard to a public-house; therefore I think there is a distinction between the two cases, and I am not sure that, if the words occurred in a section in which the case of a hotel had not been previously dealt with, I might not have come to the conclusion that a sufficiently wide construction might be put upon those words to include a hotel; but here the note to the schedule deals with hotels at its very commencement, and deals with them by reference to s. 43 of the Inland Revenue Act, 1880. It has been contended before us that, as hotels over 50*l.* in value, with a bar less than 25*l.* in value, are entitled to the privilege of a charge of only one-third of the ordinary charge, all other hotels which do not come within that category are to have, not the same relief, but the relief to which other places, to the use of which a licence is merely auxiliary, are entitled. Nothing could have been easier, if that was the intention of the Legislature, than to say so; it would have been necessary merely to add

1906

REX v. CARTER.

Ridley J.

that in the case of other hotels, which are not within s. 43 of the Inland Revenue Act, 1880, the rule was to apply which is there applied to restaurants, eating-houses, &c. This simple way of granting the privilege was not adopted, but it is contended that the language actually used, although not so clear as might be desirable, and although not definitely directed to the case of hotels, is wide enough to include them. Upon consideration I think that the contention is not well founded, and that hotels are not included. Picture galleries, exhibitions, places of public or private entertainment, railway refreshment-rooms, restaurants and eating-houses make a list of places to which the licence is so clearly auxiliary that they really stand in a class by themselves as distinguished from a hotel, in which, if there be a bar in the nature of a public-house bar, there is a use of that bar, and a direct use of the licence, which is not merely auxiliary to any other purpose for which the hotel is used. I therefore with some hesitation come to the conclusion that this hotel was not entitled to the relief granted by the justices.

DARLING J. I am of the same opinion. To me it appears that the result of the various statutory provisions is this: All licensed premises, including hotels, are prima facie liable to this charge; for I do not think it could be properly certified of any hotel—as that word is now used—that it was used for purposes to which the holding of a licence is merely auxiliary. I think that it is in the nature of a hotel that it should be a licensed house. If a place is unlicensed, it is not in common language called a hotel; it is called a private hotel, or by some such qualification. To my mind a hotel connotes a house in which guests may stay, and which has a licence for the selling of excisable liquors. That being so, all hotels would be chargeable, and there would be then no partial exemption for any of them. But that result is provided against by the words in this schedule, "The rate of charge in the case of a hotel or other premises to which sub-s. 4 of s. 43 of the Inland Revenue Act of 1880 applies shall be one-third of that charged in other cases." Now, seeing that all hotels are chargeable, those words clearly shew that the Licensing Act, 1904, recognizes that certain hotels are entitled to relief in

respect of the amount of the charge for the compensation fund, and those are the hotels mentioned in sub-s. 4 which are over 50*l.* in annual value. Although the premises are worth more than 50*l.* a year, if the part set apart and used as an ordinary public-house is not worth more than 25*l.* a year, then relief is given. It seems to me that the result of this legislation is to leave all other hotels absolutely without that partial exemption and absolutely without any such exemption as is conferred upon certain other premises which are not hotels at all—that is to say, licensed premises used only as public gardens, picture galleries, exhibitions, places of public or private entertainment, railway refreshment-rooms, restaurants and eating-houses, which are all used for a purpose which to my mind does not and cannot include a hotel properly so called. I agree, therefore, that these rules must be made absolute.

Order absolute for a certiorari.

Solicitors for prosecutors: *F. Venn & Co., for Marks, Bedford.*

Solicitors for respondents: *Godden, Son & Holme, for Conquest & Clare, Bedford.*

W. J. B.

C. A.
1906
Nov. 27.

[IN THE COURT OF APPEAL.]

BEDE STEAMSHIP COMPANY *v.* RIVER WEAR COMMISSIONERS.

Ship—Harbour Commissioners—Dock—Advertisement of Depth of Water on Dock Sill—Obligation to use reasonable Care to provide for Ingress and Egress of Ships—Warranty of Accessibility.

Where harbour commissioners, who are authorized and required by statute to execute works of improvement and maintenance in a harbour, and are empowered to make and maintain docks in connection therewith, and to take harbour and dock tolls and dues in respect of the use of the harbour and docks, advertise that there is a certain depth of water on the sill of a dock belonging to them, they thereby incur, towards shipowners who send their ships to the dock on the faith of that advertisement, the obligation of at least using reasonable care to provide for an access from and to the sea to and from the dock with a sufficient depth of water under the normal conditions of the time of year for all ships of such draught as to enable them to pass over the dock sill.

Therefore, where in such a case the commissioners had not used such care, but had allowed silt to accumulate at the entrance of their harbour, and a ship had consequently been detained for four days in the dock:—

Held, that the commissioners were liable to the shipowners in damages for the detention of their ship.

Semble, a warranty of the accessibility of a dock may be implied from such an advertisement, for ships of such draught, as before mentioned, so far as that accessibility depends on the condition of places within the harbour works or so situated that their condition is within the commissioners' powers of inspection and control.

Williams v. *Swansea Harbour Trustees*, (1863) 14 C. B. (N.S.) 845, discussed.

Appeal from the judgment of Jelf J. in an action tried by him without a jury.

The action was brought by the owners of a steamship called the *City* to recover damages for the detention of their ship. The statement of claim, so far as material, was as follows: "(2.) The defendants are and were at all material times, by virtue of divers statutes in that behalf, the harbour authority for, and are and were in the occupation and control of, the port and harbour of Sunderland, including the Hudson Docks, and the approaches thereto. (3.) The defendants are and were entitled to receive port and dock dues in respect of vessels navigating and using the

said port and docks, and it became and was their duty to cleanse and maintain the same, and do all things necessary for the purpose of carrying on and maintaining the free navigation of the said port and docks, and for the purpose of rendering the said port and docks, and the approaches thereto, safe and commodious. (4.) In or about the month of March, 1904, the plaintiffs' steamship *City* was, for reward paid to the defendants, admitted into the Hudson Docks, and was there loaded, until the said steamship was on March 24, 1904, at or about 4 A.M., ready to leave the said docks, loaded to a draught of 21 ft. 11 in. forward and 21 ft. 10 in. aft. (5.) The defendants did not perform the duties set out in paragraph (3.) hereof, and did not take due or reasonable care about the performance of the same, but suffered the approaches to the said docks, particularly at the pier entrance, to become so silted, or so obstructed by sand or other material, that the said steamship was unable to proceed out of dock, or to pass out of the said pier entrance when loaded as aforesaid, and was detained until March 28, 1904. (6.) Further, the defendants knew, or ought to have known, that the said entrance, and the approaches to the said docks, were in the said condition, and that they were not in a fit or proper state to allow vessels of the draught of the *City* to pass out, but the defendants did not take due care or reasonable care to remedy the said condition, or to put the said entrance or approaches into a fit or proper state to allow vessels to pass out as aforesaid. (7.) Further, or in the alternative, in the circumstances hereinbefore set out there was a warranty on the part of the defendants that the said entrance, and the approaches to the said docks, were in a fit and proper state to allow the *City* to pass out, and that there was at all material times a sufficient depth of water at the said entrance, and at the approaches to the said docks, for the said purpose. (8.) The condition of the said entrance, and of the approaches to the said docks, and the insufficient depth of water referred to in paragraph (5.) hereof, as existing between March 24 and March 28, constituted a breach of the defendants' said warranty." The plaintiffs claimed damages in respect of four days' detention of their ship.

The defendants were a corporation invested, by a series of

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

statutes which were to be read together, with powers for the improvement and preservation of the river Wear and the port of Sunderland. By 11 Geo. 4, c. xlix., s. 39, it was provided that it should be lawful for the commissioners, and they were thereby required (inter alia) to deepen, cleanse, and scour the said river Wear within the limits of the Act, and to cleanse, deepen, and enlarge the channel of the said river Wear to the mouth thereof, and to widen, contract, or lessen the mouth or entrance thereof, and to remove all trees, stones, gravel, sand, or other obstructions whatsoever which might in any way impede the navigation of the said river, port, and haven within the limits of the Act, or the improvement or use of the said river, port, and haven, and also to do all other works, matters, and things which should be necessary or proper for the rendering of the said port and haven safe and commodious, and for the improvement of the navigation of the said river, and the use thereof as aforesaid, and for executing the other purposes of the Act. Under subsequent legislation a dock at Sunderland, called the Hudson Dock, South, was, among others, constructed by the defendants, and they were entitled to charge port and dock dues in respect of vessels using the port and docks. The plaintiffs' steamship *City* was admitted, in consideration of payment of dock dues, to the Hudson Dock, South, and was there loaded, until on March 24 she was ready to leave the dock loaded to a draught of 21 ft. 11 in. forward and 21 ft. 10 in. aft. The defendants had caused to be inserted in a publication called the Shipping World Year Book for 1904 an advertisement, giving particulars with regard to their docks, in which it was stated (inter alia) that the depth of water on the sill of the Hudson Dock, South, was at high water of ordinary spring tides 25 ft. 6 in., and at high water of ordinary neap tides 22 feet, and that the South Docks, comprising among others the Hudson Dock, South, were furnished with the latest appliances for quick loading and discharge of vessels. This advertisement was relied on by the plaintiffs as containing by implication a warranty to the effect mentioned in the 7th paragraph of the statement of claim. It had been seen by the plaintiffs, and the learned judge found that they acted on the faith of it in sending their vessel to load in the defendants' dock. The access to or from the sea

from or to the Hudson Dock, South, was between pier heads at the ends of two converging walls, running respectively from south-west to north-east, and from north-west to south-east, which enclosed that part of the harbour with which the dock communicated. It appeared that, owing to the action of the tides and waves, sand accumulated, and formed what was spoken of in the argument as a "bar," near the entrance between the pier heads, and that it was the practice of the defendants to take soundings there from time to time and to cause the sand to be dredged away, in order to keep down the bar and maintain the depth of water. When the plaintiffs' vessel was ready to sail it was found that, the tides being then neap tides, there was at high water only a depth of 21 ft. 6 in. on the bar, being six inches less than on the dock sill, owing to the accumulation of sand, and the consequence was that the plaintiffs' vessel was not able to get out until March 28. There was evidence to the effect that the size of the waves on the bar during the period when the plaintiffs' vessel was detained was such that, if there had been the same depth of water on the bar as on the dock sill, or even two feet more, it would have been insufficient to enable the vessel to go out, as there would not have been depth of water enough between the waves. The learned judge found—and the Court of Appeal, as will be seen, agreed with his finding—that, assuming that there was an obligation imposed on the defendants in that behalf, the defendants had not used due diligence by taking all steps reasonably possible to keep down the bar. (1)

(1) The evidence with regard to the question whether the defendants had used due diligence or not was lengthy, and to some extent conflicting, and, that being merely a question of fact, it has not been thought necessary to set out the facts or arguments in relation thereto. The case set up for the plaintiffs, briefly summarized, appeared to have been that the defendants had notice through soundings taken by them that in February, 1904, an accumulation of silt on the bar had been and was going on, and that they had between that time and March 24 opportunities for reducing the bar by dredging sufficiently to allow the plaintiffs' ship to get out to sea, of which they could and ought to have availed themselves. The case set up for the defendants was that they had been prevented from dredging at the time in question by bad weather, and also by the fact that their dredgers were being properly employed in carrying out work elsewhere within their jurisdiction.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

The learned judge gave judgment for the plaintiffs for damages, both on the ground that there was an implied warranty by the defendants that there was the same depth of water on the bar as on the dock sill, or perhaps a greater depth, to give a margin in case of rough weather, and a breach of that warranty, and on the ground of failure in performance of a duty by the defendants.

E. T. Atkinson, K.C., and *Scott Fox, K.C.* (*Simey* with them), for the defendants. The liability sought to be imposed on the defendants must depend either on contract or on statutory obligation. It is submitted that no liability is made out in either way. The duty imposed on the defendants by s. 39 of their original Act (11 Geo. 4, c. xlix.) and subsequent enactments is a public duty, and not one for breach of which an action will lie at the suit of a private individual. The duty is one of the widest character, extending over a very large area. It would be impossible or extremely difficult to define the limits of the obligations alleged to be imposed upon the defendants by such statutory provisions in relation to individuals. Possibly, for neglect of the duty imposed by these provisions as regards the navigation of the river Wear and the port of Sunderland, an information by the Attorney-General would lie against the defendants; but it is submitted that an action for damages, or for a mandamus, at the suit of an individual, alleging private damage through such neglect, would not be maintainable. The commissioners are required to remove all obstructions which may in any way impede the navigation of the river or port, and to do all things which may be necessary for rendering the navigation of the port and haven safe and commodious, and for the improvement of the navigation of the river. Their jurisdiction under their Acts extends a long way seawards, and it would be impossible to define their obligation so as to confine it within reasonable limits, considered as an obligation towards individuals. Every sandbank in the very large area over which their jurisdiction extends may be an obstruction to navigation in the sense that, if it were not there, a ship of greater draft could go over the spot where it lies. Supposing that an exceptionally high tide or violent storm suddenly brings in a large quantity of sand

or gravel over a considerable area near the entrance to their dock, there cannot be a duty imposed upon the defendants by their Acts, quoad any particular shipowner who desires to navigate the river or port, forthwith to clear it away. It is true that they are authorized to do so, but their resources are limited, and the question is whether they are under a duty towards individuals to do so. It cannot have been intended that they should be liable at the suit of an individual for not doing anything which a jury might think they ought to have done to improve and facilitate navigation of the river Wear and port of Sunderland.

It is submitted, therefore, that, in order to succeed, the plaintiffs must make out a contract by the defendants that there should be a certain depth of water at the entrance at the particular time when the plaintiffs' ship was ready to go out. The mere fact that the defendants have made a dock, on the sill of which there is such a depth of water that a ship which can just get over the sill cannot at all states of the tides and weather get out to sea, cannot of itself be a wrongful act or a breach of contract. The defendants have no knowledge of the depth to which a vessel that has come into their docks is intended to be loaded, or of what her draught of water will be when she has completed her loading, nor at what state of the tides she will want to go out. The plaintiffs rely on the advertisement inserted in the Shipping World Year Book for 1904 as to the depth of water on the sill of the dock as constituting a warranty by the defendants as to the depth of water at the bar. The decision in *Williams* v. *Swansea Harbour Trustees* (1) related to the question whether any, and, if so, what warranty should be implied in such a case. The terms of the judgment in that case do not shew that there was any breach of contract by the defendants in the present case. There the defendants had issued a notice that the depth of water on their dock sill was 26 feet and 23 feet at the highest spring tides and 15 feet at the lowest neaps; and it was held that this amounted to a warranty that there was an available depth of water in the entrance channel "approximating" to that mentioned in the notice. Applying the precise terms of that judgment to

(1) 14 C. B. (N.S.) 845.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

the present case, it does not shew that there has been a breach of any warranty, for it is impossible to say that a depth of 21 ft. 6 in. does not approximate to a depth of 22 feet. In that case there was a difference of several feet between the depth on the dock sill and that at the entrance. That case, however, is really distinguishable in regard to its facts from the present case, for there the defendants had constructed a new dock, and had never really finished it, because they had not cleared away a large mud bank which was an obstacle just at the entrance of it. It would not be reasonable in this case to infer from the statement as to the depth of water on the dock sill a warranty as to the precise depth of water on a bar exposed to the action of the sea at a distance, or as to the possibility of ingress or egress with regard to all the distance out to sea in the case of any ship that could get over the dock sill. Assuming, however, that there was a warranty that there was the same depth of water at the bar as on the dock sill, the evidence shews that, if there had been 22 feet of water or even somewhat more at the bar on the days when the plaintiffs' ship wanted to go out instead of 21 ft. 6 in., it would have been of no avail; for, owing to the height of the waves then running on the bar, it would have been insufficient to enable her to get out. So that really the plaintiffs sustained no damage by the breach of the suggested warranty, and the damages, therefore, would be nominal. The warranty alleged to be implied by the statement as to the depth of water on the dock sill must be not only that there is the same depth of water on the bar at the time when the advertisement is issued, but that the defendants will keep the depth of water the same, which is a very strong warranty to imply in the case of a bar, which is exposed to the influence of the waves and of storms.

It may be argued that, though there was not a warranty of any particular depth on the bar, the defendants were under the circumstances bound to use reasonable diligence to enable the plaintiffs' vessel to get out to sea as soon as she was loaded, on the principle laid down in *Parnaby* v. *Lancaster Canal Co.* (1), and such like cases; but those were cases of physical damage to a

(1) (1839) 11 A. & E. 223.

vessel or her cargo through the condition of canals or docks of which the plaintiffs were not aware, not merely of a short delay; and, even if it be assumed that there was such a duty, there is no evidence of any negligence by the defendants in performance of it. [The learned counsel proceeded to discuss the evidence on the question of fact.(1)]

J. A. Hamilton, K.C., and *Manisty*, K.C. (*A. A. Roche* with them), for the plaintiffs. The judgment of the learned judge was right, whether the case be treated as one of tort or one of breach of contract. Treating it first as one of tort, i.e., of failure through negligence to perform a statutory duty, or a common law duty arising out of the possession and exercise of statutory powers, the facts bring the case within the principle laid down in *Parnaby* v. *Lancaster Canal Co.* (2), and finally established in *Mersey Docks Trustees* v. *Gibbs*. (3) The only point in discussion in the latter case was whether the common law duty, established in the case of companies carrying on business for private profit, applied to a public body, which, though it took tolls, was bound to apply them for public purposes. In *Reg.* v. *Williams* (4) this principle was applied to the Executive Government of a Colony. In this case the defendants carry on business as dockowners, and invite shipowners to send their ships to, among others, this dock, for the use of which they charge tolls and dues; and they advertise as an advantageous feature the depth of water on the dock sill, which would really be useless if a ship of the draught so indicated could not at all reasonable times get in or out of the harbour. The bar in this case is not analogous, as has been suggested, to a natural sand bank at a long distance out, but somewhere within the area over which the defendants' jurisdiction extends. It is just at the narrow entrance between the pier heads, and is obviously the result of the defendants' own works. It is as much part of the entrance to the docks as was the mud bank in *Williams* v. *Swansea Harbour Trustees* (5) or that in *Mersey Docks Trustees* v. *Gibbs*. (3) Under these circumstances it was the duty of the defendants at least to use reasonable

(1) See note on p. 313, ante.
(2) 11 A. & E. 223.
(3) (1866) L. R. 1 H. L. 93.
(4) (1884) 9 App. Cas. 418.
(5) 14 C. B. (N.S.) 845.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

care that this entrance, as being part of the works under their control, should be in such a state as to afford reasonable facilities of ingress and egress under the normal conditions of weather at any time of the year for ships of the draught indicated by the statement in their advertisement as to the depth of water on the dock sill. If this be the defendants' obligation, then the question is whether there has been a breach of it. There was, to say the least, abundant evidence to justify the learned judge's finding that there had been such a breach, and the Court will not review his finding in such a case, assuming that there was evidence both ways. [Counsel then proceeded to discuss the evidence on the question of fact. (1)]

With regard to the question of breach of contract or warranty, the case of *Williams* v. *Swansea Harbour Trustees* (2) is in effect an authority that, where harbour and dock trustees advertise a certain depth of water on their dock sill, that amounts to a warranty of such a depth of water in the entrance channel leading to the dock as to render the dock accessible to such vessels as may be deemed to be invited to enter by the advertisement. In the judgment Erle C.J. does, it is true, say that the warranty is of a depth "approximating" to that on the sill. The explanation is probably this. The port there in question was in the Bristol Channel, and the bank which formed the obstacle was one of mud. In the case of such a bank, though the depth of the water from the surface of the water to the top of the mud might be slightly less than the depth on the dock sill, a ship might to a certain extent plough through the soft mud without risk. This seems to be indicated by the evidence given in that case, which was that the dock sill in that neighbourhood was invariably made somewhat lower than the entrance, in order to prevent damage to ships in going in or out. It seems from what follows in the judgment that it was this evidence that the Chief Justice had in his mind when he used the words "or at all events approximating thereto." Whatever the term "approximating" may mean in that judgment, it cannot mean that the warranty is of a depth just so much less than the depth on the dock sill as will prevent a ship of the draught indicated from

(1) See note on p. 313, ante. (2) 14 C. B. (N.S.) 845.

coming in or going out. There would be no sense in a warranty of the same depth as that on the dock sill. The substance of the warranty is that there shall be such a depth of water at the entrance as will render the dock accessible to any vessel that can get over the dock sill. To fulfil the warranty there must be such a margin of depth as will enable the vessel to get in or out. This will vary according to the time of year. At a time of year when waves are normally higher there must be more margin than at another time. The rule as to the implication of terms in business documents is laid down by Bowen L.J. in *The Moorcock* (1) as follows: "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men."

E. T. Atkinson, K.C., in reply.

COLLINS M.R. This is an appeal from the judgment of Jelf J. in an action tried by him at Leeds without a jury. The action is brought by shipowners against the River Wear Commissioners for damages in respect of loss sustained by the plaintiffs through the inability of their ship, which had been invited into a dock belonging to the defendants, to get out of the dock for four days, owing to an obstruction in the channel leading from the dock to the sea. The case has been very ingeniously and elaborately argued for the defendants, but, as a result of the discussion which has taken place, I have come clearly to the conclusion that the judgment of Jelf J. was correct. A great effort was made on the part of the defendants' counsel, and very properly from an advocate's point of view, to deal with the case as one mainly depending on warranty; but, although the question of warranty may enter into the discussion to some extent, it appears to me that, having regard to the shape which the case took at the trial, and the conclusions of fact arrived at by the learned judge, the question of warranty occupies quite a subordinate position. The plaintiffs did not put the allegation of a warranty in the fore-front of their case. The claim is in the first instance put thus in

(1) (1889) 14 P. D. 64, at p. 68.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Collins M.R.

the statement of claim. [The Master of the Rolls here read paragraphs (2.) to (6.) of the statement of claim.]

So far the claim has no reference to warranty. Then comes the alternative claim, which is based on warranty, and which has really been the chief subject of discussion by the defendants' counsel before us.

I will deal first with the claim so far as it is not based on a warranty, and, in so doing, I will begin by reading a passage from the judgment of Blackburn J. in *Mersey Docks Trustees* v. *Gibbs*. (1) He there said, referring to the case of *Parnaby* v. *Lancaster Canal Co.* (2): "In that case the defendants were a company incorporated by Act of Parliament for the purpose of making and maintaining a canal, to be open for the use of the public on payment of rates, which the defendants were empowered to receive for their own proper use and behoof (i.e., to be divided amongst the shareholders); and the Court of Exchequer Chamber, in that case, stated the law thus: 'The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property.'"

There can be no doubt that the commissioners in this case have statutory powers, and are under statutory obligations, with regard to the harbour and port of Sunderland. By s. 39 of their original Act (11 Geo. 4, c. xlix.) they are authorized and "required from time to time to deepen, cleanse, and scour the said river Wear within the limits of this Act, and to cleanse, deepen, and enlarge the channel of the said river Wear to the mouth thereof, and to widen, contract, or lessen the mouth or entrance thereof, and to maintain and repair the present piers, and to build such other piers, or to alter the present or any other piers to be built, and also to build any quay or jetty, and to make such other works within the limits of this Act as shall

(1) L. R. 1 H. L. 93, at p. 103. (2) 11 A. & E. 223.

be necessary for promoting or preserving the navigation of the said river, and for that purpose to remove any rocks, sand, or rubbish, or other matter which shall obstruct the navigation of the said river, port, and haven, or the improvement thereof, ... and also to remove all trees, stones, gravel, sand, or other obstructions whatsoever which may any way impede the navigation of the said river, port, and haven within the limits of this Act, or the improvement or use of the said river, port, and haven as aforesaid"; and at the end of the section follow the general words, "and also to do all other works, matters, and things which shall be necessary or proper for the rendering of the said port and haven safe and commodious, and for the improvement of the navigation of the said river, and the use thereof as aforesaid, and for executing the other purposes of this Act." This is the original Act, the provisions of which underlie the whole question.

There were several later Acts by which the area of the commissioners' work and jurisdiction was enlarged; and the particular part of their undertaking now in question has been carried out under one of those Acts. In addition to the mouth of the river itself, the defendants opened out another passage into the sea, south of the main entrance, and that entrance so made is the subject of the present discussion. They made that entrance by building out two converging walls, running respectively from north-west to south-east and from south-west to north-east, and leaving an opening into the sea between the pier-heads at the ends of these walls, through which a vessel may enter, and, on entering, finds herself on the way to a series of docks built by the commissioners, and which they invite the owners of ships to use.

The object of a ship's entering a dock being, generally speaking, to load before the commencement of a voyage, or to unload on its termination, unless a ship can get into or out of a dock when loaded, there is no meaning in advertising information with regard to the depth of water or to the various conveniences or appliances of the dock. Such information can only relate to the ulterior purposes of loading or unloading. In an advertisement inserted by the defendants in the Shipping World Year

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Collins M.R.

Book for 1904, they stated, among other particulars, that the depth of water on the sill of the gate of the Hudson Dock, South, the dock with which we are concerned, was at high water of ordinary spring tides 25 ft. 6 in. and at high water of ordinary neap tides 22 feet; and, further, that that dock, among others, was furnished with the latest appliances for quick loading and discharge of vessels. These statements are obviously intended to set forth the attractions of the port for vessels, and are certainly representations not only as to the facilities that exist for vessels when they have got into and are in the dock, but also by implication as to its accessibility.

Here the plaintiffs' vessel came into Sunderland in ballast for the purpose of taking in cargo, and before her owners sent her in they had seen the advertisement to which I have just referred, and would have gathered from it the matters therein stated by way of inducement to them to send their vessels into the dock to be loaded. Among these were the particulars as to the depth of water on the dock sill. Therefore, in sending this vessel into the dock to load, and in loading her when in the dock, they would have regard to the depth of water so indicated. It is not disputed that the draught of the vessel, when her loading was complete, was such as to enable her to pass over the dock sill at that depth. She was ready to start on March 24, when it was found that, though she could get over the dock sill, nevertheless, there being only 21 ft. 6 in. of water on what has been called the "bar, though I hardly think it could properly be called a bar in the ordinary sense of the term, at the entrance between the converging walls, there was not sufficient depth of water to enable her to get out to sea; and in the result the plaintiffs' vessel was detained for a period of four days before she could get out.

The point was taken for the defendants that, if there had been the same depth of water on the bar as on the dock sill, or even rather more, it would not, under the conditions then existing, have enabled the ship to get out. There was, mainly in connection with the question of warranty, much ingenious discussion on this point; but, on consideration, it is obvious that, when depth of water is spoken of in relation to the draught of

a vessel, it means depth of water available for floating the vessel under the conditions of weather existing at the time. Where there is just water enough, if the water is still, to float a vessel, there will not be enough to do so, if the water is agitated by big waves. If a certain depth of water will just enable a vessel to get over the dock sill, where the water is calm and its surface is uniform, the same amount will not enable her to get over the bar when the sea is as rough as was the case when the plaintiffs' vessel wanted to go out, because the depth of water will then fluctuate. I do not think it would follow, because the depth of water on the bar was such that, if the water had been still, there would have been an available depth of 22 feet, the same as on the dock sill, or even rather more, that the defendants would necessarily have fulfilled their obligations in that behalf.

The first question appears to me to be whether it was not the duty of the defendants, under the circumstances, to take all reasonable care to secure for ships, loaded up to the full draught of which the depth of water on the dock sill admitted, the means of ingress and egress to and from the dock, so that it might be possible for them under normal conditions of weather, having regard to the time of year, to enter the dock from the sea, or to go out to sea from the dock, as the case might be, at all reasonable times; and then, if so, the question will be whether there was evidence here to justify the learned judge in finding that the defendants had not taken all reasonable care to do so. In my opinion the evidence in this case justified the learned judge in holding that such a duty as I have mentioned had arisen on the part of the defendants, and that there was a breach of it by them. This dock was held out by the defendants to the plaintiffs and other shipowners as a place reasonably fit for ships of the draught indicated by the advertisement as to the depth of water on the dock sill to load or unload in, and they were invited to send their ships in for those purposes, and with the object of going out again with cargo. It appears to me that underlying this invitation was a representation which involved a duty, namely, a representation that a ship so invited in could safely load and get out again, and, the defendants having thus accepted the obligation of giving accommodation to ships of such draught, whose

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Collins, M.R.

owners might desire to avail themselves of it, their duty was at least to take all reasonable care to secure for those ships means of safe ingress to and egress from the dock to which they were invited by the defendants. It is a question of evidence whether they did take such reasonable care in this case. The judge who heard the evidence has come to the conclusion that they did not, and he has pointed to certain instances of neglect on their part. [The Master of the Rolls then proceeded to analyse the evidence bearing on the question whether there had been a breach of the before-mentioned duty on the part of the defendants, and arrived ultimately at the conclusion, in substance, that there was evidence that the defendants were aware that silt was, at the time in question, accumulating on the bar, and that, notwithstanding the fact that they had been for considerable periods prevented from dredging by the weather, there had been opportunities, of which they could and ought to have availed themselves, for dredging away the silt sufficiently to enable the plaintiffs' ship to get out to sea on March 24.]

Therefore it appears to me that, upon the true view of the law and the facts, the conclusion arrived at by the learned judge was right.

Now I come to the question which was put in the forefront of the case by the defendants' counsel, as if it were the only foundation upon which the plaintiffs' claim rested, namely, the question of warranty. The defendants' counsel sought very ingeniously, by so treating the plaintiffs' claim and pointing out the difficulties which arose with regard to it, if so treated, to obscure the stronger aspects of the plaintiffs' case. The claim in respect of warranty is thus put in the plaintiffs' statement of claim. [The Master of the Rolls here read paragraphs (7.) and (8.) of the statement of claim.] As there put, the claim so made seems, with reference to the circumstances of the present case, simple enough, and I should not have thought that it was capable of much discussion. It seems reasonable that, if the owners of a dock invite shipowners to bring their ship into the dock to load, that would impliedly involve an undertaking on the part of the dockowners to the effect that, so far as the matter was within their control, there would be a sufficient depth of water for her when loaded to

get out again ; but the defendants' counsel fixed in this connection upon one word in the judgment in the case of *Williams* v. *Swansea Harbour Trustees* (1), and sought to read it in a sense which perplexes the whole discussion. That case bears some resemblance to the present. It was a case of a vessel coming into a dock and loading, and then not being able to get out again because of an obstruction outside the dock. The defendants' counsel fixed on the word "approximating" used in the judgment, and said that, if the terms of that judgment were applicable here, the defendants had satisfied the warranty, because there was a depth of 21 ft. 6 in. on the bar, and it is impossible to say that that depth does not approximate to 22 feet. Then, as before mentioned, they made the further point that, if there had been six inches more of depth on the bar, and therefore a warranty that there was the same depth of water on the bar as on the dock sill had been fulfilled, the plaintiffs would have been no better off, because under the circumstances that existed the plaintiffs' vessel could not then have got out, and therefore the damages for breach of the warranty would be nominal. Now the use of the word "approximating" in the judgment in *Williams* v. *Swansea Harbour Trustees* (1) seems to me capable of a simple explanation in connection with what appears likely to have been the state of facts in that case, namely, that, in the passage leading to the dock, the bottom was of soft mud, through which to a slight depth a vessel might safely pass, though, if the depth of the water were measured to the surface of the mud, there might not be quite the depth of water specified as existing on the dock sill ; and therefore it was thought that to say that there was an absolute warranty of exactly the same depth as on the dock sill might in the particular case be to put the warranty too high. That is very probably the reason why the word "approximating" was used. But the warranty really is in its essence of the accessibility of the dock, and not of correspondence more or less exact between the depth of water at the entrance of the harbour and that of the dock sill. The substance of the decision is that there is a warranty by implication in such

(1) 14 C. B. (N.S.) 845.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Collins M.R.

a case that there is safe ingress or egress for vessels loaded up to the standard indicated by the advertised depth of water on the dock sill. It was only by treating that depth as indicating a particular depth of water warranted to exist at the entrance that the defendants' counsel could apply the terms of that decision so as to be favourable to his own case. I have already pointed out that, when there is a sea on, and the water therefore fluctuates considerably in depth, it will not suffice that the depth of water on the bar should be such that, if the sea were calm, it would be the same as on the dock sill, and that in such a case it would be necessary to have an increased depth of water for the purpose of giving a margin, so that a ship which could just get over the dock sill should be able to get over the bar. According to the rule laid down in *The Moorcock* (1), such an implication is to be made as will give such business efficacy to the transaction as must have been intended by both parties to it as business men. Possibly there may be a difference in the conclusion to be arrived at as to the implication of a warranty in a case where the obstruction was within or close to the entrance to the harbour works and one where it was a considerable distance out. It might be easy to infer an absolute warranty where the matter was one within the control of the defendants, and where the question arose in respect of an easily accessible part of the water-way, but more difficult where the matter was not always under their absolute control, and where at the spot in question the conditions were such as to render it impossible, or extremely difficult, for the defendants to inform themselves of the state of things that existed or to remedy it. But whatever may be the standard of warranty applicable, I think that in this case there is abundant evidence of failure on the part of the defendants to satisfy it. The particular point in question does not seem to have been really outside the harbour, but within or close to the end of the converging walls. It seems to me probable that this so-called bar is caused there by the waves and currents in consequence of the introduction of the artificial element of these walls. It does not appear to me to be a bar in the proper sense of the term, but to be inside the harbour and

(1) 14 P. D. 64, at p. 68.

within the scope of the defendants' statutory obligations. It is not really denied that they had the means of dealing with it. The result of the evidence seems to me to be that they did not exercise due diligence, having regard to what may be considered the reasonable standard of their responsibility in the matter. For these reasons I think that the judgment of the learned judge should be affirmed.

COZENS-HARDY L.J. I am of the same opinion, and have nothing to add.

FARWELL L.J. I am of the same opinion.

It is admitted that the dock in question and the access thereto are part of the undertaking of the defendant Commissioners, in respect of which they had statutory duties to perform. It is clear that a corporation authorized by statute to maintain and keep open a dock, and to charge a toll for its use, is under an obligation at common law to take reasonable care to keep the access thereto, so far as such access is vested in them, or under their control, free from obstacles, so that the public may use it without danger, whether such tolls are taken for the private benefit of the corporation or are applied in performing a public duty bringing no profit to the corporation. The authorities for that proposition are *Mersey Docks Trustees* v. *Gibbs* (1) and *The Bearn.* (2) This principle has also been extended to the Executive Government of New Zealand in *Reg.* v. *Williams.* (3) And the case is stronger when, as under the Act of 11 Geo. 4, the Commissioners are not merely empowered, but are required, amongst other things, to remove all obstructions that may in any way impede the navigation or the use of the port or haven. Nor is it any answer to say, as has been argued here, that the defendants were not idle, but were employing their resources in other parts of the undertaking. Lord Blackburn has dealt with that argument in the case of *Mersey Docks Trustees* v. *Gibbs.* (4) He says: "It is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who

(1) L. R. 1 H. L. 93.
(2) [1906] P. 48.
(3) 9 App. Cas. 418.
(4) L. R. 1 H. L. 93, at p. 107.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Farwell L.J.

pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

Whatever may be the difficulty of formulating any rule as to the depth of water that may be required by ships desiring to enter a dock, I think it follows, as a necessary corollary to the rule stated above, that there is a further obligation to take reasonable care to keep the approaches to the dock clear to a depth sufficient to allow every vessel received into the dock to leave again with a full load under normal conditions of wind and weather. Here the judge has found that it was necessary for this purpose to dredge a channel through the so-called bar at the pier heads and to keep the channel clear, and I agree with that finding. The learned judge has further found as a fact that reasonable care was not taken in the performance of this duty, and I think that his finding in this respect also was quite right. The question turned to a great extent on the reliance to be placed on the evidence of some of the witnesses, and it is in such a case almost impossible for this Court, which has not, to overrule the judge, who has, seen the witnesses. The Master of the Rolls has gone through the evidence on the subject, and I can only say that I entirely agree with his conclusions. So much for the first cause of action.

The second cause of action, namely, that based on warranty, arose in this way. The warranty relied upon is the statement contained in the advertisement of 1904, and the learned judge accepted the evidence of the plaintiffs that they contracted on the faith of that statement. If a dock owner for his own profit invites shipowners to bring their ships into a dock upon a statement that there is a minimum depth of water on the sill of the dock, he thereby, in my opinion, impliedly warrants that there is access in normal conditions of weather, having regard to the time of year, to and from his dock from and to the open sea for ships, loaded as full as is reasonably proper having regard to the

depth of the water alleged by the dock owner to exist in the dock. The depth of the channel by which such access is gained must vary according to circumstances. The case of *Williams* v. *Swansea Harbour Trustees* (1) turned no doubt on the notice alleged in that case to have been given of a specified depth of twenty-six feet and twenty-three feet at the highest spring tides and fifteen feet at the lowest neaps. But, in my opinion, the Court intended to formulate the sensible proposition that the warranty was of access for ships, loaded as before mentioned, and not of a particular approximate depth which might vary more or less, down to the point of not giving access; for such a warranty might be illusory. There is one passage in the judgment of Erle C.J. which looks at first sight as though he was referring to the specific depth mentioned there, and I venture to suggest that two or three words must have dropped out of that sentence. It is about seven lines down in the judgment, and is as follows: "That I construe to amount to a warranty that ships wishing to use the dock would find an accessible entrance thereto of that depth, and that their contract was broken if that was not so." I should prefer to read that—"would find an accessible entrance thereto for ships requiring dock accommodation of that depth," which would make the proposition in my opinion perfectly intelligible. The gist of the warranty is to my mind the possibility of access, not any specified depth. It may be a depth "approximating," but only so far as the smaller depth is compatible with the possibility of ingress or egress.

We were pressed with the argument of hardship on the dock owner, but with regard to implications in a contract, as Lord Bowen said in the case of *The Moorcock* (2): "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men." In this case there is on the one hand the dock owner who can, if he pleases, protect himself by stating that he will not warrant the depth, or that, though the depth on the dock sill is so much, he will give no warranty as to the possibility of

(1) 14 C. B. (N.S.) 845. (2) 14 P. D. 64, at p. 68.

C. A. 1906

BEDE STEAMSHIP COMPANY v. RIVER WEAR COMMISSIONERS.

Farwell L.J.

access. On the other hand, there is the shipowner, who, seeing the statement as to depth on the dock sill without any qualification, comes to the harbour. Is it reasonable to suppose that, if his ship gets in, she should stay there indefinitely, or until the channel is cleared for her, or that, if she is outside, she should stand off and on, or possibly anchor off a lee shore until she can get in? Treating Lord Bowen's view as the test, it appears to me that such a warranty as I have mentioned is what would reasonably be contemplated by the shipowner undoubtedly, and by the dock owner, because the absence of such a warranty would obviously deter shipowners from using his dock. As regards this particular case, it is material that there never has been such a sudden silting up of the access as would render it unreasonable for the dock owners to warrant such access at all times and in all circumstances; for there has never been before the present occasion, during the fifty years or so that the dock has been opened, any difficulty about keeping this dock properly open. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Maude & Tunnicliffe, for Simey & Iliff, Sunderland.*

E. L.

In re COLONEL EYRE (Deceased).

1906
Dec. 11.

Inland Revenue—Estate Duty—Reversionary Interest—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 6.

Where under s. 7, sub-s. 6, of the Finance Act, 1894, the person accountable for the estate duty on an interest in expectancy has exercised the option given by that sub-section, and deferred the payment of the duty in respect of that interest until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has fallen into possession, and not merely its value on the death of the deceased.

Appeal from the decision of the Commissioners of Inland Revenue under s. 10 of the Finance Act, 1894.

The following statement of facts was made by the executor of the late Colonel Eyre, and accepted by the Commissioners :—

"Probate of the will, dated December 8, 1902, of Colonel H. R. Eyre, deceased, who died on March 12, 1904, was granted to me and to Mary Allgood Eyre, at the principal registry of the Probate Division of the High Court of Justice, on July 28, 1904.

"The property passing on the death of the deceased included a reversionary interest subject to a life interest of the said Mary Allgood Eyre, in the residuary personal estate of General Henry Eyre, deceased, who died in 1888.

"In exercise of the option conferred by s. 7, sub-s. 6, of the Finance Act, 1894, I and my said co-executrix determined to pay the duty in respect of the said reversionary interest when such interest should fall into possession.

"For the purpose of determining the rate of the estate duty in respect of the rest of the estate of the deceased the said reversionary interest was valued as at the death of the deceased at 13,758*l.* 9*s.* 6*d.*, and the duty on the rest of the estate, the total value of which, including the value of the said reversionary interest, as at the death of the deceased, was 94,738*l.* 12*s.* 5*d.*, has been paid at the rate of 5½ per cent.

"The said Mary Allgood Eyre died on February 11, 1906, and on that day the said residuary interest fell into possession.

"On March 31, 1906, a corrective affidavit was rendered to the

1906

EYRE, *In re.*

Commissioners for Inland Revenue shewing, as the fact is, that the value of the said reversionary estate at the death of the deceased was 13,758*l.* 9*s.* 6*d.*, and that the value of such interest when it fell into possession, namely, on February 11, 1906, was 28,939*l.* 9*s.* 2*d.*

"The Commissioners claim that the duty to be paid in respect of the said reversionary interest should be on the value of such interest as at the date when the same fell into possession and not on the value as at the date of the death of the deceased.

"While agreeing with the Commissioners that for the purpose of determining the rate of the duty in respect of the said interest, the value of the said reversionary interest should be taken as at the date when it fell into possession, my solicitors on my behalf contended that the amount upon which the duty should be paid should be the value as at the date of the death of the deceased. The Commissioners formally notified my solicitors of their intention to claim duty on the basis of the value of the said interest as at the date when the same fell into possession, and accordingly they assessed the duty at 1736*l.* 7*s.* 4*d.*, being at the rate of 6 per cent. on the said sum of 28,939*l.* 9*s.* 2*d.*

"Being a person aggrieved within the meaning of s. 10, sub-s. 1, of the Finance Act, 1894, by the said decision of the Commissioners and being desirous of appealing to the High Court pursuant to the provisions of the said section, I contend that the said decision or claim of the Commissioners was erroneous on the following grounds—

"(*a*) Because the duty under the provisions of the Finance Acts, and in particular s. 7, sub-s. 5, of the Finance Act, 1894, should have been assessed upon the value of the said reversionary interest as at the time of the death of the deceased, and not as at the time when the said reversionary interest fell into possession.

"(*b*) Because although for the purpose of determining the rate of the duty to be paid in respect of a reversionary interest when it falls into possession under s. 7, sub-s. 6 (*b*), of the Finance Act, 1894, such reversionary interest ought to be valued as at the date when it falls into possession, for the purpose of determining the amount upon which the duty ought to be paid, such reversionary interest ought to be valued as at the time of the

death of the deceased, and not as at the time when such interest falls into possession." (1)

S. A. T. Rowlatt, for the appellant. Sect. 7, sub-s. 6, is only intended to deal with the rate of estate duty, not with the amount on which that duty is to be paid. It gives an option whether the duty on a reversionary interest should be paid with the rest of the duty on the death or should not be paid until it actually falls into possession, and all that it means to provide is that if when it falls into possession its value is such as to raise the rate at which the duty is payable, the duty should be paid upon it at that advanced rate if it has not been paid before, but it does not mean that the duty then payable is to be paid on the value of the reversionary interest as taken at that date. The amount on which estate duty is to be paid is always to be ascertained on the death of the deceased, and that is the amount on which the estate duty in this case is payable, although no doubt at a higher rate than was payable on the rest of the estate. The value of the whole of Colonel Eyre's estate at his death, including the reversionary interest, was under 100,000*l.*, and, therefore, the rate at which duty had to be paid was 5½ per cent. If the executors had thought fit to pay the duty on the value of the reversionary estate as then ascertained, they would, therefore, have paid the duty at that rate. They, however, preferred to exercise the option given them by s. 7, sub-s. 6, and to postpone paying the duty till the reversionary interest fell into possession. When it did so its value was so much enhanced as to send up the total value of the colonel's estate over 100,000*l.*, so that duty at

(1) By the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7, sub-s. 6: "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—

"(*a*) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and

"(*b*) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained."

1906

EYRE, *In re.*

the rate of 6 per cent. and not of 5½ per cent. became payable on the value of the reversionary interest, but the value of the reversionary interest on which it became payable was the value as ascertained at the date of the colonel's death and not the enhanced value when it fell into possession.

The word "rate" in s. 7, sub-s. 6, only means percentage, and has nothing to do with the amount of the duty. Sub-s. 5 of s. 7 gives the means by which the principal value of any property is to be ascertained by the Commissioners as the price which such property would fetch if sold in the open market "at the time of the death of the deceased." There is no provision for ascertaining the value of the property at any other time. *Lord* v. *Colvin* (1) is no authority on this case, as it turned on the construction of 55 Geo. 3, c. 184.

Vaughan Hawkins (the *Attorney-General* (*Sir J. Lawson Walton, K.C.*) with him), for the Crown. On the true construction of s. 7, sub-s. 6, when the option is exercised and payment of the duty is deferred till the reversionary interest has fallen into possession, the amount on which the duty is payable is the amount of the value of that interest when it has fallen into possession and not the value at the date of the death of the deceased. In the vast majority of cases the duty is payable at the death of the deceased and that is the meaning of sub-s. 5 of s. 7 for ascertaining the value of the property. But sub-s. 6 gives an option to defer payment of the duty on a reversionary interest, and if that option is exercised the amount and not merely the rate may be increased. It is clear that if the sub-section ended with the words "or when the interest falls into possession" the duty, if payment was deferred, would be payable on the value of the interest when it fell into possession, and the two following clauses do not alter this but only deal with the rate at which that duty is to be paid.

Rowlatt replied.

BRAY J. The difficulty of construing this sub-section of the Finance Act, 1894, is undoubtedly a serious difficulty, because the statute has not done what one would have expected it to do,

(1) (1867) L. R. 3 Eq. 737.

namely, state in clear terms what was to be the amount on which the duty was to be payable at each of the times given by the option, namely, the time of the death and the time when the reversionary interest falls into possession.

It is contended that if the sub-section had ended "or when the interest falls into possession" my decision must be in favour of the Crown; and I think that that argument is sound. We are dealing here with something out of the ordinary way. In the ordinary way the estate duty is to be paid at the time of the death, but here an option is given to pay part of the duty at another time. The sub-section says: "Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate" (it does not say on what amount; but I think it may be fairly taken to mean on the value of that interest, viz., an interest in expectancy) "or when the interest falls into possession," on the value of that interest, viz., an interest in possession. I think that words may be considered as implied in each of those cases to this effect, "on its then value." I think that that is a fair inference. I think it is legitimate to take into consideration what the state of things was at the time of the passing of the Act, namely, that in the case of administration duty when it was not paid until the interest fell into possession it had, according to *Lord* v. *Colvin* (1), to be paid upon the then value of the interest and not merely on the value of the contingent interest at the date of administration.

I think the rest of the section bears out this, because it says in (*b*) that "the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession." That is, no doubt, dealing merely with the *rate* of the duty and not with the *amount* on which that duty is to be paid; but still, I think it shews what was intended before, namely, that the duty that was to be paid when the interest fell into possession was to be paid on the value of that interest when it fell into possession.

Well, now there is the whole case; sub-s. 5 no doubt says:

(1) L. R. 3 Eq. 737.

1906

EYRE, *In re.*

Bray J.

"The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased"; but I think it is sufficient to say as to that provision that it applies to the ordinary case and not to the exceptional case where this option is given; so that in the result my judgment must be for the Crown.

Judgment for the Crown.

Solicitors for appellant: *Freshfields.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. P. P. K.

1906

Dec. 11.

COOPER (SURVEYOR OF TAXES) *v.* BLAKISTON.

Revenue—Income Tax—Public Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act, 1842 (5 & 6 *Vict.* c. 35), *s.* 146, *Sched. E*, *r.* 1.

Easter offerings given to the incumbent of a benefice as a personal gift to himself are not perquisites or profits accruing by reason of his office within the meaning of r. 1 of the Income Tax Act, 1842, s. 146, Sched. E, and he is therefore not liable to pay income tax under Sched. E upon them.

CASE stated by the Commissioners of Income Tax.

The respondent, the Rev. D. Y. Blakiston, was the Vicar of East Grinstead, and appealed against an assessment of 56*l.*, made under Sched. E of the Income Tax Acts upon him for the year ending April 5, 1906.

Upon the hearing of the appeal the following facts were proved or admitted.

The said sum of 56*l.* was paid to and received by the respondent, who has been Vicar of East Grinstead for about thirty years, and for eight years has received at Easter sums similar to the sum now in question and popularly known as Easter offerings. Previously to the last eight years a sum was collected for the respondent at Easter time by means of a collecting book.

The greater part of the said sum was received through the collection made by the churchwardens in the said church on

Easter Sunday, but part of such sum consisted of gifts by parishioners and others who were unable to attend the services that day, and other part of such sum consisted of gifts by Non-conformists and other persons, some of whom only attend the respondent's church occasionally, and a few so far as is known not at all; some of the said gifts having been sent or handed to the churchwardens privately, and some to the respondent personally. The said collections and gifts are popularly known as Easter offerings, and were made in response to the notices and appeals hereinafter referred to.

In March, 1905, a letter was received by the churchwardens of the diocese of Chichester, including those of East Grinstead, from the Bishop of Chichester, a copy of which was published in the Chichester Diocesan Gazette for April, 1905. The letter is as follows:—

"Allow me to recommend to your favourable notice the laudable practice of making freewill offerings at Easter to the parochial clergy, who are seldom sufficiently endowed. I learn with sincere satisfaction that in response to the appeal made by me last year there has been a marked increase both in the number and the amount of the offerings made. The total sum received by the clergy in 1904 in the diocese was 9249*l.*, an increase of 593*l.* on the previous year, and it is encouraging to find that in rural as well as in urban districts such offerings are now generally made. It is admitted on all hands that the clergy as a body are miserably underpaid, and this is especially the case with those who hold livings depending mainly for income on land and tithes, both being much depressed below their former value, and great hardships are often suffered by those of the clergy who possess little or no private means. In these circumstances it becomes the duty as well as the privilege of the laity to do what they can to rectify or mitigate hardship by freewill personal gifts made to those who are labouring amongst them in the Master's cause, and experience has abundantly shewn that churchpeople welcome an opportunity of acknowledging this duty and privilege, and that not grudgingly or of necessity, but as cheerful givers. Now as it is obvious that the clergy cannot themselves take action in the matter, I ask the churchwardens

1906

COOPER v. BLAKISTON.

to be kind enough to take such steps as are necessary, and my request is that the collections in church on Easter Day shall be devoted to the personal use of the incumbent, and this as a personal, non-official, freewill gift, due notice of this being of course given beforehand to the parishioners so that all such gifts may be given on this express understanding."

Upon receipt of this letter by the churchwardens they met together and considered the Bishop's suggestions, and accordingly placed in the pews of the church on the Sunday before Easter and on Easter Day notices in the following form—which had been suggested by the Bishop:—

"St. Swithun's Church, East Grinstead.

"With the sanction of the Bishop of the Diocese and to meet the wishes of the congregation, the collections to be made on Easter Sunday, together with any further sums that may be sent to us will be handed to Mr. Blakiston for his personal use as a freewill offering to him personally, and all sums given in the collection or sent to us afterwards will be given and sent on that understanding only."

The churchwardens intended and wished it to be understood that the contributions were to be a freewill gift to the respondent personally. The respondent had no legal claim or right to call for any such contributions or such collection.

The people's churchwarden was called before the Commissioners, and, in cross-examination, he stated: "The churchwardens enter the amount into a book kept for the purpose in the vestry. If the vicar misconducted himself I should not be a party to giving him the offerings. The offerings are freewill as an acknowledgment for his good work and the esteem in which he is held. The good work he does is the work of a vicar, but his compulsory work might fall far short of what he does. As he is so zealous, and on account of his popularity, we make a collection at Easter as a freewill gift for his personal use." In re-examination he stated that, notwithstanding the Bishop's letter, he quite understood it was optional on their part as to whether they gave the offerings. The respondent was bound to perform certain duties and was paid for such. There was no obligation to increase his stipend.

The respondent contended that the gift of the said sum was

purely personal and a non-official freewill gift made to him as an individual and not to him as vicar or by reason of his office, and that the sum was not given in augmentation of his stipend or as a reward for his ministrations, and that the presentation was optional on the part of the churchwardens.

The appellant contended that the Easter offerings were perquisites or profits accruing to the respondent by reason of his office as vicar within the meaning of 5 & 6 Vict. c. 35, s. 146, Sched. E, r. 1. (1)

The Commissioners decided that the Easter offerings of 56*l.* paid in 1905 to the respondent were not assessable and discharged the assessment, but stated this case for the opinion of the Court.

The *Solicitor-General* (*Sir W. S. Robson*) (*W. Finlay* with him), for the Crown. These Easter offerings are taxable as a profit of the office of incumbent. They are given to the incumbent in virtue of his office: *Herbert* v. *McQuade* (2); *Inland Revenue* v. *Strang*. (3) [He also referred to *Turner* v. *Coxon*. (4)]

Danckwerts, K.C. (*Austen-Cartmell* with him), for the respondent. These payments are not taxable. They were not made as in *Herbert* v. *McQuade* (2) to increase the emoluments of a particular benefice, nor were they given as remuneration for services rendered or as an augmentation of the incumbent's stipend. They were personal gifts to the incumbent and in no sense profits of his office. [He referred to *Poynting* v. *Faulkner* (5) and *Turton* v. *Cooper*. (6)]

W. Finlay replied.

BRAY J. In my view the judgment in this case must be against the Crown. They have failed to satisfy me that the moneys which Mr. Blakiston received here were profits accruing by reason of his office or employment.

(1) By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, Sched. E, r. 1: "The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . . ."

(2) [1902] 2 K. B. 631.

(3) (1878) 15 Sc. L. R. 704.

(4) (1888) 22 Q. B. D. 150.

(5) (1905) 93 L. T. 367.

(6) (1905) 92 L. T. 863.

1906

COOPER v. BLAKISTON.

Bray J.

The question that I have to decide is, whether in this particular case these Easter offerings were profits accruing to Mr. Blakiston by reason of his office. I have to look at the principles laid down in the cases already decided on this point. The chief case that has been cited is *Herbert* v. *McQuade*. (1) In that case the Master of the Rolls says (2): "Undoubtedly these facts give rise to very nice considerations; and the question is on which side of the line this particular augmentation falls. If, as the respondent contended, it was in fact a gift personal to himself, I do not think that it would fall within Sched. E; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability." Further on he says (3): "Broadly, are they designed to be gifts to persons who happen to be poor whilst they are in occupation of benefices which are also poor, or are they primarily intended to augment the allotted stipends attached to particular benefices without special personal reference to the incumbent for the time being?" Then he proceeds to analyse the facts, which are obviously very different from these facts, and he says (4): "It will be seen from these extracts that the society itself abstains altogether from inquiry into the personal circumstances of the incumbent for the time being. It emphasises the fact that it is dealing with a recognized state of things which in itself involves an injustice: that persons are put into onerous charge of parishes whose circumstances have to be inquired into and form a cardinal element in dealing with the case—parishes where the duties, by reason of the population, situation, and other circumstances are largely out of proportion to the income of the benefice. That is what they are dealing with, and they are dealing with it irrespective of the personal circumstances of the incumbent in charge of the benefice, though of course as to that person himself, when he is making up his mind as to whether he shall apply for the grant or not, no doubt the facts of his personal income would necessarily and naturally be present to his mind; as between himself and the society, however, that is left by them to the incumbent. What the council deal with is the benefice, the emoluments

(1) [1902] 2 K. B. 631.
(2) Ibid. at p. 641.
(3) Ibid. at p. 643.
(4) Ibid. at p. 644.

attached to it, and the work imposed upon the incumbent." There are further remarks by his Lordship (1): "Do not these facts taken together point to this, that this is an organized attempt by benevolent persons—that is to say, persons who are of opinion that the labourer is worthy of his hire, and that the Church as a body ought to give an equivalent for the services that it receives—to bring up the emolument to the level of the duties, and that the system upon which they proceed to do that is to look to the duties incident to the incumbency of the particular benefice, to look to the emoluments and outgoings of that benefice, and to adjust their augmentation accordingly, entirely irrespective of the person holding the benefice?"

The same principle, though in slightly different words, was laid down by the Master of the Rolls in the case of *Poynting* v. *Faulkner* (2) where he said (3): "Now, I think the question in this case is that which was put by the Attorney-General in his opening, whether this is an augmentation of stipend or a personal gift." That is what I have to decide; is this an augmentation of stipend or a personal gift?

Now I will refer to the facts stated in the case to see within which branch this case comes. A great deal of reference, of course, has been made to the Bishop's letter of March, 1905. What I have to find out, I think, is the real intention of the giver, and I can only find that out by seeing on what grounds the giver was asked to give and what documents he had before him when he made his gift. First, there is this letter. Does that shew that these gifts were to be an augmentation of the stipend or a personal gift to the incumbent? It begins by stating that the parochial clergy are seldom sufficiently endowed. It then says: "It is admitted on all hands that the clergy as a body are miserably underpaid, and this is especially the case with those who hold livings depending mainly for income on land and tithes." Then it goes on, and these are the important words which seem to me to govern the real reasons for which the gift is asked: "And great hardships are often suffered by those of the clergy who possess little or no private means. In

(1) [1902] 2 K. B. at p. 646. (2) 93 L. T 367.
(3) Ibid. at p. 370.

1906

COOPER v. BLAKISTON.

Bray J.

these circumstances it becomes the duty as well as the privilege of the laity"—he is appealing now to the people to give—"to do what they can to rectify or mitigate hardships"—not to increase the income. That is not the main object. The main object is to rectify and mitigate hardship, that is, of persons who do not receive sufficient income and have no private means; in other words, poor people who are suffering hardship. By what? "By freewill personal gifts." I leave out the word "freewill" because it is conceded that the mere fact of the gift being voluntary has really very little bearing on the question. "By personal gifts made to those who are labouring amongst them in the Master's cause, and experience has abundantly shewn that Church people welcome an opportunity of acknowledging this duty and privilege, and that not grudgingly or of necessity, but as cheerful givers." He says it is obvious the clergy cannot ask for themselves, and then comes the appeal: "My request is that the collections in church on Easter Day shall be devoted to the personal use of the incumbent, and this as a personal, non-official, freewill gift, due notice of this being of course given beforehand to the parishioners so that all such gifts may be given on this express understanding." It seems to me, unless I am to decide that this does not really express the intention of the writer, that I must come to the conclusion that these gifts were asked for as personal, non-official, freewill gifts from the parishioners to Mr. Blakiston.

The Solicitor-General's argument upon that point is this: he says this is a contradiction in terms. It is no use to say that it is a personal, non-official, freewill gift because they are offerings collected in church and they are given to the incumbent. Now it seems to me that the decision of Channell J. in *Turton* v. *Cooper* (1) negatives that, because in that case they were Church offerings, and they were given to the incumbent; but he came to the conclusion that inasmuch as they were primarily given to him because he was poor they were personal gifts, and not given as an addition to the remuneration or stipend. It seems to me if this is a genuine letter, and these gifts were really given on

(1) 92 L.T. 863.

that understanding, I can come to no other conclusion than Channell J. came to in *Turton* v. *Cooper*. (1)

There are further documents set out in the case which emphasize what I have stated. There is the notice given by the churchwardens: "With the sanction of the bishop of the diocese, and to meet the wishes of the congregation, the collections to be made on Easter Sunday, together with any further sums that may be sent to us will be handed to Mr. Blakiston"—they do not say "to the clergyman" or "the vicar"—"for his personal use as a freewill offering to him personally, and all sums given in the collection or sent to us afterwards will be given and sent on that understanding only." I have to consider if that is genuine. It is followed by this statement in the case: "The churchwardens intended and wished it to be understood that the contributions were to be a freewill gift to the respondent personally." Then comes the evidence of the churchwarden, and I do not see any suggestion there by the cross-examiner that these were mere forms and not intended to represent the true nature of the gift. There is nothing in this case which would justify me in coming to the conclusion that these documents were mere forms, and that they did not represent the real intention of the parties. It therefore follows from that that the persons who contributed were asked to contribute for a certain specific purpose. They contributed for that purpose, and that purpose was a personal gift to the vicar—no doubt to the vicar as vicar, but a personal gift to him, not as an addition to his remuneration, not as an augmentation of his stipend, as was particularly specified in those two cases in Court of Appeal, but as a personal gift to himself.

Under these circumstances it seems to me that these moneys were not profits accruing to Mr. Blakiston by reason of his office, and, therefore, are not taxable. My judgment, therefore, must be for the respondent.

Appeal dismissed.

Solicitors for appellants: *The Solicitor of Inland Revenue.*
Solicitor for respondents: *Hare & Co.*

(1) 92 L. T. 863.

A. P. P. K.

1906
Dec. 14, 17.

LEONIS STEAMSHIP COMPANY, LIMITED *v.* RANK, LIMITED.

Ship—Charterparty—Demurrage—Lay Days—Arrival at Place of Loading.

There is in general as between shipowner and charterer (subject to a few possible exceptions) an obligation on the ship to go to the berth selected by the charterer. The obligation arises not necessarily from the terms of the charterparty, but rather from the relative positions of the shipowner and charterer, and the purpose and object of the contract, viz., to take the charterer's goods. The terms of the charterparty must, however, be looked at to see whether the obligation to go to the berth selected by the charterer is to be performed in the shipowner's time before the ship can be treated as an arrived ship, or in the charterer's time after the lay days have commenced.

By a charterparty it was agreed that the plaintiffs' steamship should "proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . viz., (4.) at one or two safe loading ports or places in the river Paraná, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship . . . . time for loading shall commence to count twelve hours after written notice has been given by the master . . . . that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers."

The vessel was ordered to Bahia Blanca. She arrived off the pier at Bahia Blanca, and anchored in the river within the port a few ship's lengths off the pier. The place where the vessel anchored was not the usual loading place, but was merely a possible loading place. The master then gave notice that the ship was ready to load. The charterers desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port:—

Held, that the lay days did not begin twelve hours after the notice of readiness to load given by the master, but only after the vessel obtained the berth alongside the pier, inasmuch as there was no definite provision contained in the charterparty upon the point, and the rule laid down by Brett L.J. in *Nelson* v. *Dahl*, (1879) 12 Ch. D. 568, followed in *Pyman* v. *Dreyfus*, (1889) 24 Q. B. D. 152, applied.

Sanders v. *Jenkins*, [1897] 1 Q. B. 93; 2 Com. Cas. 12, discussed and explained.

Action tried in the Commercial Court before Channell J. without a jury.

The action was brought by the plaintiffs, the Leonis Steamship

Company, Limited, against the defendants, Messrs. Joseph Rank, Limited, of Hull, for (inter alia) demurrage.

The plaintiffs were the owners of the steamship *Leonis*, which was of 2660 tons gross register, and the defendants were the receivers of the cargo and the holders of the bills of lading dated respectively March 31 and April 3 and 5 incorporating a charterparty dated December 30, 1904, made between the plaintiffs of the one part and Messrs. Brauss, Mahn & Co., of Buenos Ayres and Antwerp, of the other part.

The charterparty (so far as material) was as follows: "Buenos Ayres, ... December 30, 1904. The Uniform River Plate Charterparty, 1904.

"Homewards—Steam.

"It is this day mutually agreed between Thos. L. M. Rose as broker for and on behalf of owners of the good screw steamship called the *Leonis* of the measurement of 2660 tons gross and 1701 tons net register, ... now trading and Messrs. Brauss, Mahn & Co., Buenos Ayres, charterers (3.)—that the said ship being tight, stanch, and strong and in every way fitted for the intended voyage, shall . . . . after arrival at Montevideo . . . . and after discharge of her inward cargo, if any, proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . in bags and (or) bulk, to be loaded as follows—viz., (4.) at one or two safe loading ports or places in the river Paraná, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, ... (5.) and being so loaded shall with reasonable speed therewith proceed to St. Vincent . . . . or Las Palmas . . . . at master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at a safe port in the United Kingdom, ... or so near thereunto as she can safely get (always afloat) and deliver the cargo, in accordance with the custom of the port for steamers, on being paid freight at and after the following rates—viz. (6.) 18*s*. 3*d*. per ton for cargo loaded in the river Paraná . . . . (9.) Charterers have the option of loading at a third port in the river Paraná

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

within the above limits, in which case the freight to be 6*d.* per ton more on the entire up-river cargo; (10.) Charterers have the option of loading the entire cargo at Bahia Blanca at the rate of 17*s.* 6*d.* per ton. (21.) Orders for the first loading port are to be given by the charterers (or their agents) immediately upon the written application of the master, brokers or agents between 9 A.M. and 6 P.M., ... upon master's report of arrival in ballast . . . . at Montevideo or at an Argentine port as per clause 3, otherwise time used in waiting for orders shall count as lay-days, and the cancelling date shall be correspondingly extended. (22.) Lay days not to commence before February 15, 1905 unless charterers begin shipping sooner, and should steamer not be ready to load by 6 P.M. on March 15, 1905 charterers to have the option of cancelling this charter-party; and for the purpose of this clause the preliminary twelve hours' notice of readiness to load, stipulated for in clause 23, shall not be obligatory. (23.) Cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted, (if the ship be not sooner despatched) and time for loading shall commence to count twelve hours after written notice has been given by the master . . . . on working days between 9 A.M. and 6 P.M. to the charterers or their agents that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers . . . . to the ship, at the rate of 4*d.* sterling per gross register ton per day. . . . . (31.) . . . . Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage and all other charges whatsoever. . . . . (39.) If the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores . . . . railway employees or other labour connected with the working, loading or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading-places beyond the control of charterers, the time lost not to be counted as part of the lay days (unless any cargo be actually loaded by the steamer during such time) but lay days to be extended equivalent to the time lost owing to such cause or causes. . . . ."

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

The *Leonis* proceeded to Montevideo under the charterparty, and upon her arrival there she was ordered by the charterers to proceed to Bahia Blanca. The vessel arrived at Bahia Blanca about noon on February 24, 1905, and anchored about three ships' lengths from the railway pier. On the same day pratique was obtained, and at 4.30 P.M. notice of arrival was given to the charterers. The charterers desired the *Leonis* to go alongside the mole (i.e., the railway pier). All the berths alongside the mole were occupied, and, in some instances, the vessels lying two or three abreast. About forty-six vessels were already in the port on the *Leonis's* arrival. Work was going on busily on the mole. The *Leonis* remained anchored till March 28, during which time no cargo came alongside; though lighters could be used, and were, in fact, being used for discharge to a vessel lying a little higher up the river. On March 29 the *Leonis* was ordered to go alongside another vessel, which had the inner berth alongside the mole, and she accordingly did so. Immediately a lighter came alongside to discharge wheat. That lighter's cargo was completely discharged by March 30, and the vessel then got an inner berth. On March 30 the vessel began to load, and completed loading her cargo of 4196 tons of grain on April 5. The plaintiffs claimed demurrage upon the ground that the lay days began to run under the charterparty twelve hours after the notice of arrival at Bahia Blanca was given on February 24, 1905, in which case they would have expired on March 22. The defendants, however, contended that the lay-days did not begin to run till the *Leonis* obtained her berth alongside the mole, in which case she loaded within much less time than that allowed by her charterparty. At the trial evidence was given from which Channell J. drew the inference that the place where the *Leonis* anchored was not a usual loading place at Bahia Blanca, but was merely a possible loading place.

J. A. Hamilton, K.C., and *Bailhache*, for the plaintiffs. The charterparty provides that the vessel is to proceed to a place or places as ordered by the charterers. She was ordered to Bahia Blanca. Therefore the class of cases applies which deals

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

with charterparties in which there is a named port, and no particular spot in the port is mentioned. The words of the charterparty mean what they say. They say that the ship has to proceed to Bahia Blanca, and it follows that when she arrives in the port she is an arrived ship, and if there is any subsequent delay, the loss falls upon the charterers: *Pyman* v. *Dreyfus* (1); *Dahl* v. *Nelson, Donkin & Co.* (2) *Pyman* v. *Dreyfus* (1) has never been overruled, and is consistent with every other decision. It decides that a charterparty means what it says. *Sanders* v. *Jenkins* (3) is not inconsistent with *Pyman* v. *Dreyfus.* (1) The words of the charterparty in *Sanders* v. *Jenkins* (3) were materially different from those in *Pyman* v. *Dreyfus.* (1) The effect of the charterparty in *Sanders* v. *Jenkins* (3) was that the ship contracted not merely to proceed to the port and load, but to proceed to a place as customary and there unload. The case was therefore within the decision in *Tharsis Sulphur Co.* v. *Morel.* (4) *Pyman* v. *Dreyfus* (1) was not cited in *Sanders* v. *Jenkins* (3), nor is it mentioned in the judgments in *Tharsis Sulphur Co.* v. *Morel.* (4) It is clear that those judgments do not affect the authority of *Pyman* v. *Dreyfus.* (1) Nor is there anything in *Sanders* v. *Jenkins* (3) which conflicts with the principle which is laid down in *Pyman* v. *Dreyfus* (1), and which is a sound principle.

In Carver on Carriage by Sea, 3rd ed. par. 624 a, it is said that "the rule, then, appears to be, that when a fixed period is allowed for loading or discharging, and the place named in the contract for the loading or discharging is of wide extent, and not a definite spot, the lay days begin when the ship is ready and at the charterer's disposal within the named place, although she may not be in the berth or dock where the particular cargo is to be loaded or discharged." And in par. 627 the result of the decisions is thus stated: "It seems impossible to reconcile all these authorities, but the following propositions are submitted to be correct: (3.) 'When the place named is a port, or other wide district, the lay days begin when the ship is ready, and at the freighter's disposal, within the named place; though she may

(1) 24 Q. B. D. 152.
(2) (1881) 6 App. Cas. 38.
(3) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(4) [1891] 2 Q. B. 647.

not be in a position to take in or discharge cargo, and though she may not be at the wharf, dock, or other part of the place to which the charterer may have properly required her to go.' "

It is true that in the judgment of Bovill C.J. in *Tapscott* v. *Balfour* (1) there is the dictum that "The rule is, that when a port is named in the charterparty as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place." But this dictum is overruled by the decision in *Pyman* v. *Dreyfus* (2), and is contrary to the opinion expressed by Brett L.J. in *Nelson* v. *Dahl.* (3)

The Felix (4) only decides that as the part of the dock to which the ship is to get is of importance to the charterer and not to the shipowner, the charterer can order her to that part of the dock. No question arose in that case as to whether the ship was an arrived ship. The only contest was as to the particular spot where the charterer wished his goods deposited, but the lay days began when she arrived at the dock. In *Sanders* v. *Jenkins* (5) counsel for the plaintiff was understood by the judge to admit more than the state of the authorities compelled him to admit. The word "expressly" in proposition (4.) in par. 627 of Carver on Carriage by Sea (3rd ed.) is correctly introduced. The proposition is only true where the right to name the wharf is expressly given to the charterer by the charterparty.

[*The Katy* (6) was also referred to.]

Scrutton, K.C., and *A. J. Ashton, K.C.*, for the defendants. Demurrage does not commence till the vessel has arrived at the usual place of loading nominated by the charterers. The risk of berths being occupied by other ships falls on the vessel, not on the charterers. Clause 23 of the charterparty means that the master is to give notice when the vessel is in her proper berth ready to load: *Sanders* v. *Jenkins.* (5) There has been some

(1) (1872) L. R. 8 C. P. 46.
(2) 24 Q. B. D. 152.
(3) 12 Ch. D. 568.
(4) (1868) L. R. 2 A. & E. 273.
(5) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(6) [1895] P. 56.

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

conflict of authority upon the question whether the risk of delay in the ship being able to get to the berth ordered by the charterer falls upon the shipowner or the charterer. Until the decision in *Tharsis Sulphur Co.* v. *Morel* (1), the following authorities could have been relied upon in support of the contention that the risk falls upon the charterer: *The Carisbrook* (2); *Dall' Orso* v. *Mason & Co.* (3); *Ashcroft* v. *Crow Orchard Colliery* (4); *Pyman* v. *Dreyfus* (5); *Davies* v. *McVeagh.* (6) In *Murphy* v. *Coffin* (7) the opposite view was taken. That case is an authority for the proposition that the risk is on the shipowner, if the charterer names a place to which it is impossible to get. *The Carisbrook* (2) was overruled by the Court of Appeal in *Tharsis Sulphur Co.* v. *Morel* (1), and it was said that the decision in *Dall' Orso* v. *Mason* (3) was wrong, and that in *Murphy* v. *Coffin* (7) right. The Court of Appeal in *Tharsis Sulphur Co.* v. *Morel* (1) affirmed the principle that the risk of not being able to get to the berth ordered by the charterer falls upon the shipowner. *Pyman* v. *Dreyfus* (5) must be considered to have been overruled.

In *Tharsis Sulphur Co.* v. *Morel* (1) there was an express clause in the contract giving the charterers the right to order the ship to a berth. In *Sanders* v. *Jenkins* (8) there was no express clause giving the charterers the right to name a place to which the ship was to go. In *The Felix* (9) it had been decided that the charterer had the right to name the place of discharge where the charterparty was similar to that in *Sanders* v. *Jenkins.* (8) It follows that the charterer has the right to choose a usual place of discharge. *The Felix* (9) shews that counsel for the plaintiff in *Sanders* v. *Jenkins* (8) made the admission that the charterers had an option of designating the particular wharf at which they desired the ship to unload, because if the charterparty provides that the vessel is to proceed to a port and there deliver a cargo the law reads in the words "in the customary manner." The shipowner only fulfils

(1) [1891] 2 Q. B. 647.
(2) (1890) 15 P. D. 98.
(3) (1876) 3 R. 419.
(4) (1874) L. R. 9 Q. B. 540.
(5) 24 Q. B. D. 152.
(6) (1879) 4 Ex. D. 265.
(7) (1883) 12 Q. B. D. 87.
(8) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(9) L. R. 2 A. & E. 273.

the contract when he goes to the usual place of discharge named by the charterer. Therefore in *Sanders* v. *Jenkins* (1) the point was decided which arises in the present case. *Brereton* v. *Chapman* (2) and *Kell* v. *Anderson* (3) are to the same effect as *Sanders* v. *Jenkins*. (1) In *Monsen* v. *Macfarlane* (4) the decision turned upon the provisions of the colliery guarantee. On principle it seems clear that, as the lay days begin to run when the ship gets to the place she has to get to, the charterers have the right to order her to such a place. Whether the charterparty expressly or impliedly gives the charterer the right to name the particular berth at which the ship shall discharge, the lay days do not begin to run till the ship has got there. That position is limited in Carver on Carriage by Sea, 3rd ed. par. 624 b, and proposition (4.) of par. 627 to the case where the charterparty expressly gives the charterer the right, but it is equally true if the right is given by the charterparty impliedly. Propositions (1.) and (2.) laid down in par. 627 of Carver on Carriage by Sea are correct.

[Scrutton on Charterparties and Bills of Lading, 5th ed. pp. 99 to 102, was also referred to.]

Cur. adv. vult.

Dec. 17. The following judgment was read by

CHANNELL J. I have to give my decision upon a point raised at the end of the plaintiffs' case, which if decided one way will put an end to the case; if decided the other way there will be further points to be gone into. The steamship *Leonis* was under a charter to go to Montevideo for orders to proceed to one or other of certain South American ports, including Bahia Blanca. She was ordered to Bahia Blanca, and the charterparty has to be construed exactly as if it had been only to proceed to Bahia Blanca and there load. The charter provided that the lay days were to begin twelve hours after notice that the ship was ready to load. The ship arrived off the pier at Bahia Blanca and anchored in the river within the port a few ship's lengths off the pier. The master

(1) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(2) (1831) 7 Bing. 559.
(3) (1842) 10 M. & W. 498.
(4) [1895] 2 Q. B. 562.

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

Channell J.

then gave the notice that the ship was ready to load. The charterer desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port, and the question is whether the lay days begin twelve hours after the notice or only after her getting the berth alongside. There are very numerous cases on the question when lay days begin, and some judges, particularly the late Brett L.J. in *Nelson* v. *Dahl* (1) and in *Tharsis Sulphur Co.* v. *Morel* (2) (when he had become Lord Esher M.R.), have endeavoured to lay down rules, but there have been considerable differences of opinion at various times and on various points, and eminent writers of text-books have followed the example of the judges both in endeavouring to lay down rules and also in differing as to what those rules are. Now some are fairly clear. Where the charter is to proceed to a dock and there load, it is sufficient if the ship gets into the dock, and the lay days then begin, although there may be delay in her getting to the loading berth in the dock: *Tapscott* v. *Balfour* (3) and other cases. If the charter is to proceed to a port and there load and nothing more is said, then it is, I think, clear that it is not sufficient for the ship to get within the outskirts of the port, but she must get to some usual loading place within the port. This is expressed by Mr. Carver in his work on Carriage by Sea by saying that the ship must get within the commercial port as distinguished from the legal or geographical port. He means, I think, by this the same thing as a usual loading place in the port. Then it certainly was supposed at one time to be the rule that if the ship got so far (there being nothing further in the charterparty than to go to the port) it was sufficient, and she was then an arrived ship, and the lay days began. This appears to have been decided in *Pyman* v. *Dreyfus* (4), but this is the proposition which is now questioned. Next it is of course clear that if the actual loading berth is named in the charterparty the ship must get there, and lay days do not begin until she does. Further, if the charter contains an express option to the charterer to name a berth, the berth when selected and named is to be

(1) 12 Ch. D. 568.
(2) [1891] 2 Q. B. 647.
(3) L. R. 8 C. P. 46.
(4) 24 Q. B. D. 152.

treated as written into the charter, and the charter is to be construed as if the berth had been named there originally. This is decided in *Tharsis Sulphur Co.* v. *Morel.* (1) In the next place, whether such an option is expressed in the charter or not, there nevertheless is an obligation on the ship to go to the berth selected by the charterer: see *The Felix.* (2) There questions of demurrage and lay days were no doubt discussed, but it does not seem to have been necessary to decide these points, and the decision proceeded on general grounds. It is obviously the right of the charterer, whose cargo it is which has to be loaded and which he is bound to have ready there for loading, to select (of course within the limits of the port or other place named in the charter) the particular place for loading, and not for the shipowner to say where he will take the cargo, but this obligation arises not necessarily from the terms of the charter, but rather from the relative positions of shipowner and charterer and the purpose and object of the contract, viz., to take the charterer's goods. The existence of this obligation is quite consistent with its being performed in the shipowner's time, that is, before the lay days commence, or in the charterer's time, that is, after the lay days commence, and you must, I think, look to the terms of the charterparty and to the rules for its construction to see in whose time it is that the getting to the berth selected is to be done. It is not necessary for my present purpose to consider how far the general right of the charterer to select the loading berth is to be qualified, as, for instance, by saying that he must not select a place the physical access to which is obstructed or that he must select a place to which access can be got in a reasonable time. There have been differences of opinion, at all events, on the latter point. Now this being the state of the authorities when the case of *Sanders* v. *Jenkins* (3) came before Collins J., he got from Mr. Bankes, the counsel arguing on behalf of the shipowners, an admission that the obligation to go to the berth selected by the charterer existed, and he treated that as an admission that the obligation arose under the charter in that case. If it were so, of course it followed from *Tharsis*

(1) [1891] 2 Q. B. 647. (2) L. R. 2 A. & E. 273.
(3) [1897] 1 Q. B. 93; 2 Com. Cas. 12.

1906

LEONIS STEAMSHIP COMPANY, LIMITED v. RANK, LIMITED.

Channell J.

Sulphur Co. v. *Morel* (1) that the place selected by the charterers had to be written into the charterparty. This is the case mainly relied on by Mr. Scrutton on behalf of the defendants, while Mr. Hamilton, on behalf of the plaintiffs, relies on *Pyman* v. *Dreyfus* (2), which case Mr. Scrutton suggests has been overruled. I do not, however, find that it has been either expressly overruled or even dealt with by any judges as a discredited case. It was quoted in *Tharsis Sulphur Co.* v. *Morel* (1), but is not mentioned in the judgment, although both Lord Esher M.R. and Bowen L.J. go through the cases and say which they think right and which they consider they are overruling. If the two cases *Pyman* v. *Dreyfus* (2) and *Sanders* v. *Jenkins* (3) really are inconsistent, I think I should be bound to follow the decision of a Divisional Court rather than the decision of a single judge at Nisi Prius. I am, however, prepared to go beyond that, and say that I think Mr. Scrutton's view of *Sanders* v. *Jenkins* (3) cannot be right, for if it is it amounts to saying that Collins J. in that case laid down a new rule, and that whatever the charterparty may say (unless, of course, it contains express provision to the contrary, or unless perhaps there is some binding custom of the port to the contrary) the rule now is that lay days do not begin until the vessel reaches the loading berth selected by the charterer. That gives delightful simplicity, and is a rule which the House of Lords may perhaps be good enough to lay down, or even the Court of Appeal might perhaps feel able to do so; but as it involves giving the go-by to some scores of cases, I think a judge of first instance can hardly do it. Moreover, the new rule would be inconsistent with the well-established rule as to cases where the charterparty names a dock, and it would be very peculiar if there was a greater obligation on the ship as to going to a specific berth where the charterparty was less specific by naming a port only than where it was more specific and named a dock. I think the true rule is that, although there is in general (and subject to a few possible exceptions, which I do not deal with) an obligation on the ship to go to the berth selected by the charterer, yet the terms of the charter must be

(1) [1891] 2 Q. B. 647. (2) 24 Q. B. D. 152.
(3) [1897] 1 Q. B. 93; 2 Com.Cas. 12.

looked at to see whether that is to be done in the shipowner's time before the ship can be treated as an arrived ship, or in the charterer's time after the lay days have commenced, and I do not think the old rules as to when lay days begin can be considered abrogated. I think that Collins J. in *Sanders* v. *Jenkins* (1) treated the admission of counsel for the shipowners as meaning that the charterparty in that case obliged the ship to go to the charterer's berth, and therefore held the case governed by *Tharsis Sulphur Co.* v. *Morel.* (2) In the case before me I find nothing in the charterparty to guide me definitely on this point, and I must follow the rule as stated by Brett L.J. in *Nelson* v. *Dahl* (3), followed in *Pyman* v. *Dreyfus.* (4) The lay days are to begin twelve hours after notice that the ship is ready to load, and if the ship was, when notice was given, in a usual loading place within the port, I think she was ready, and although she would have to go to the berth alongside the pier, as ordered by the charterers, yet she would go there in the lay days. I have some evidence from the captain that the place where he brought up was a usual loading place, but I understand there is evidence to the contrary taken on commission, and that evidence I think I must hear.

Further evidence was then given.

CHANNELL J. The evidence is not very satisfactory, but the inference I draw is that the place where the vessel anchored was not the usual loading place, but was merely a possible loading place. The time taken in getting to a berth cannot be included in the lay days.

Judgment for defendants.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for defendants: *Pritchard & Sons, for Hearfields & Lambert, Hull.*

(1) [1897] 1 Q. B. 93; 2 Com. Cas. 12.
(2) [1891] 2 Q. B. 647
(3) 12 Ch. D. 568.
(4) 24 Q. B. D. 152.

J. E. A.

C. A.
1906
Dec. 21.

[IN THE COURT OF APPEAL.]

ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RAILWAY COMPANY, Applicants; TAFF VALE RAILWAY COMPANY, Defendants.

Railway—Difference between Railway Companies—Agreement confirmed by Special Act—Provision for Arbitration—Arbitrator designated by Name—Death of person designated—Railway Commissioners, Jurisdiction of—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 8.

Where by the terms of an agreement confirmed by the special Act of a railway company it was provided that any question which might arise between that company and another railway company as to the construction or carrying into effect of the agreement should be referred to a person designated by name, or, him failing, to an engineer to be appointed by the Board of Trade on the application of either party, and differences subsequently arose between the two companies as to the construction and carrying out of the agreement, the person so designated as aforesaid having in the meantime died:—

Held, that the case fell within the proviso to s. 8 of the Regulation of Railways Act, 1873, and therefore the power to compel a reference of differences to the Railway Commissioners given by that section did not apply.

Appeal from the decision of the Railway Commissioners (Bigham J., the Hon. A. E. Gathorne-Hardy, and Sir James T. Woodhouse), as after mentioned.

The applicants were the successors in title of the Pontypridd, Caerphilly, and Newport Railway Company.

By the Pontypridd, Caerphilly and Newport Railway Act, 1878, that company were authorized to construct a railway as described in the Act, commencing by a junction with the defendants' railway, the Taff Vale Railway, and terminating in the parish of Eglwysilan by a junction with the Rhymney Railway.

By the said Act certain heads of agreement between the Taff Vale Railway Company of the one part and Sir George Elliott, Bart., on behalf of the promoters of the undertaking by the said Act authorized, of the other part, set forth in Sched. A to the said Act, were confirmed and made binding on the Pontypridd, Caerphilly, and Newport Railway Company and the Taff Vale Railway Company. The fifth clause of that agreement was

as follows: "Any question which may arise between the parties as to the construction or carrying into effect of this agreement to be referred to Thomas Elliott Harrison or, him failing, an engineer to be appointed by the Board of Trade on the application of either party."

Differences having arisen between the applicants and the defendants as to the construction and carrying out of the agreement, and the said Thomas Elliott Harrison having in the meantime died, the applicants commenced proceedings before the Railway Commissioners for the determination of those differences under s. 8 of the Regulation of Railways Act, 1873.

The defendants applied to the Registrar of the Railway Commission for a stay of proceedings in the above-mentioned application to the Railway Commissioners, pending a reference to arbitration pursuant to clause 5 of the agreement scheduled to the Pontypridd, Caerphilly, and Newport Railway Act, 1878. The registrar referred that application to the Commissioners, who granted the stay of proceedings on the ground that the case came within the proviso to s. 8 of the Regulation of Railways Act, 1873. The judgment of Bigham J. is given in a note below. (1)

(1) BIGHAM J. This question is a pure question of the construction of the Act of Parliament and the agreement; and I think that the defendants' construction is right. With reference to the first point taken by the applicants, namely, that in this case the arbitrator was designated, not by an Act of Parliament, but by an agreement, I think that s. 15 of the Railway and Canal Traffic Act, 1888, disposes of it. That section provides that, "for the purposes of s. 8 of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorized to be referred to arbitration, the provisions of any agreement confirmed or authorized by any such Act shall be deemed to be provisions of such Act." The words of that section are perfectly plain. The agreement in this case is an agreement confirmed by the special Act, and in my opinion the Court must read the agreement as though it formed part of the Act. Then I turn to s. 8 of the Act of 1873, which provides that, "where any difference between railway companies . . . . is, under the provisions of any general or special Act . . . . required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of

C. A. 1906

ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RAILWAY v. TAFF VALE RAILWAY.

C. A. Russell, K.C., and *R. Whitehead*, for the applicants. The provision for reference in this case was contained in the agreement scheduled to the Pontypridd, Caerphilly, and Newport Railway Act, 1878, and not enacted by the Act itself. But, assuming that, inasmuch as that agreement was confirmed by the Act, it must be taken that the provision stands on the same footing as if it had been enacted in the Act, it is submitted that the case comes within the enacting portion of s. 8 of the Regulation of Railways Act, 1873, and does not come within the proviso to that section. The provision in clause 5 of the agreement is an alternative one, which in effect designates Thomas Elliott Harrison as arbitrator, if alive and prepared to act, but, him failing, i.e., if he is dead or unable to act, then an engineer to be nominated by the Board of Trade. It is the same really as if the Act had provided that all differences should in the lifetime of Thomas Elliott Harrison be referred to him. As matters stand, there is

being referred to arbitration." The question we have to decide is whether we have jurisdiction under that section to determine this dispute. That depends, in my opinion, upon the proviso to the section, which states that "the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name." I stop there, for I think that is all I need read. Those are the words which apply to this case. Now, has any arbitrator in this case been designated by name in a general or special Act, which includes, as I have already said, an agreement confirmed by an Act? I do not see how anyone can doubt it. Clause 5 of the agreement says: "Any question which may arise between the parties as to the construction or carrying into effect of this agreement to be referred to Thomas Elliott Harrison." There is the person designated by name, and the words of the proviso are therefore satisfied. It was argued that he is not the only person designated, because the clause goes on to say "or, him failing, an engineer to be appointed by the Board of Trade." But a person is none the less designated by name within the meaning of the proviso, because someone else to be nominated by somebody else is substituted in the event of his failing to act. That does not alter the fact that a person has been designated by name. It was said that the proviso cannot apply because Mr. Harrison is dead, but I do not see how his death can alter the effect of the words of the proviso. The agreement as confirmed by the special Act provides for the case of his failure to act, and I think the only course which the parties can take under the circumstances is to apply to the Board of Trade for the appointment of an engineer as provided by the agreement.

no reference of these differences to a person designated by his name or by the name of his office. If there is a reference to a named person and he dies, then there is no reference at all.

J. Eldon Bankes, K.C., and *Harold Russell*, for the defendants, were not called upon to argue.

COLLINS M.R. This is an appeal from the Railway Commissioners, the question in which turns upon the construction of s. 8 of the Regulation of Railways Act, 1873. That section is as follows: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration." In this case there are no doubt differences between the two railway companies, which, under the provisions of the statutory agreement embodied in the special Act, are required and authorized to be referred to arbitration; so that prima facie the case comes within the enacting part of the section. But then comes the proviso, which is in these terms: "Provided that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may more conveniently be referred to him." Bigham J. and the other Commissioners have held that the proviso applies to the present case, because, by the terms of the statutory agreement between the companies, "any question which may arise between the parties as to the construction or carrying into effect of this agreement" is "to be referred to Thomas Elliott Harrison or, him failing, to an engineer to be appointed by the Board of Trade on the application of either party." The Railway Commissioners were of opinion that, having regard to that provision, in this case an

C. A. 1906

ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RAILWAY v. TAFF VALE RAILWAY.

Collins M.R.

arbitrator had in the "special Act been designated by his name"; and none the less so because, if he failed to act, the dispute was to be referred to "an engineer to be appointed by the Board of Trade on the application of either party." It seems to me that the decision of the Commissioners was perfectly right. The Legislature, by this provision of the Act, were, with regard to certain disputes, substituting a special tribunal for the ordinary jurisdiction of the Courts; and, obviously, in so doing, they bore in mind the possibility that in some cases another special method of dealing with disputes of the nature contemplated had been, or might be, provided by Act of Parliament, in which case they did not propose to interfere with the method so provided. Bigham J. has pointed out, in dealing with this case, that the fundamental condition upon which the applicability of the proviso depends, namely, the designation of an arbitrator by his name in an Act of Parliament, has been fulfilled. It is urged that in the events which have happened the disputes between the parties cannot be referred to the person designated by name. The answer seems to me to be that that is not the test. The question is whether the condition expressed by the words of the proviso has been fulfilled. Those words clearly provide that in cases where a person has in an Act of Parliament been designated by name as arbitrator, the provisions of the section are not to take effect. The general intention indicated on the part of the Legislature appears to be that, in all cases where an Act of Parliament provides that disputes between railway companies shall or may be referred but does not nominate any arbitrator, the Railway Commissioners may determine those disputes, but when the Act has itself nominated an arbitrator, then the power of compelling a reference to the Commissioners is not to apply. For these reasons I think that the appeal must be dismissed.

COZENS-HARDY L.J. concurred.

FARWELL L.J. The terms of the proviso clearly import that the intention of the Legislature was to exclude from the operation of s. 8 all cases in which, by a general or special Act, a person has been designated by his name, or by the name of his

office, as arbitrator. The words are not, as the counsel for the applicants would read them, "any case in which there is an arbitrator who has in any general or special Act been designated by his name," but "any case in which any arbitrator has in any general or special Act been designated by his name." In this case clearly an arbitrator had in the special Act been designated by his name.

C. A. 1906

ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RAILWAY v. TAFF VALE RAILWAY.

Appeal dismissed.

Solicitors for applicants: *Markby, Stewart & Co.*

Solicitors for defendants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

E. L.

STEELE *v.* SOUTH WALES MINERS' FEDERATION AND OTHERS.

1907 *Jan.* 11, 12.

Trade Union—Raising of Funds for Purposes within Objects of Union—Rules of Union—Absence of Provision in Rules for levying Contributions—Injunction to restrain Levy—Jurisdiction of Court.

One of the objects of a trade union as defined by its rules was "to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament." The rules, however, did not provide any machinery for making a levy upon the members of the union for the purposes of the said funds, nor did they indicate the persons by whom such levy was to be made. A resolution in favour of a general contribution by the members for that purpose having been passed by a large majority of the union, the officials of the union proceeded to levy the contribution. A member of the union who objected to the contribution sought to obtain an injunction restraining the union and its officials from making the levy, upon the ground that in the absence of provision in the rules for making it the levy was illegal:—

Held, that as the provision of a parliamentary representation fund was within the scope of the association, and as the majority of the members were in favour of it, the Court would not interfere with the levy of contributions to that fund merely because the rules did not expressly provide the necessary machinery for making it.

APPEAL from the Tredegar County Court.

The defendant federation is a trade union registered under the Trade Union Acts. It is formed of lodges composed of workmen employed at South Wales collieries and being members of the

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

federation. The lodges are grouped into districts, and each lodge and district has a separate set of officers whose powers and duties are defined by the rules. The federation has a president, vice-president, treasurer and secretary, and an executive council, the members being elected by the districts. It has also trustees in whom the property of the federation is vested. The rules of the federation were certified as altered in January, 1901. By rule 3 of those rules the objects of the federation are, so far as is material to this case, stated to be —

(1.) "To provide funds by entrance fees, contributions, levies, donations, and fines to carry on the business of the federation in the objects hereinafter specified, the same to be disbursed as provided in the following rules."

(7.) "To provide a weekly allowance for the support of members who may be victimized, locked out, or on strike, and to resist any unjust regulation connected with their employment."

(11.) "To provide funds for securing the carrying out of rule 38, Coal Mines Regulation Act, 1887, i.e., inspection of collieries by workmen."

(12.) "To provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament and other public councils and boards, and to request them to press forward by every legitimate means all proposals conducive to the general welfare of the members of the federation."

By rule 4: "Contributions.—Each member of this federation shall pay not less than one shilling per lunar month or sixpence per fortnight."

By rule 16: "There shall be an annual conference, which shall be composed of members from every lodge amalgamated with the society, and shall discuss all matters according to the arrangement set forth in the agenda agreed upon by the council."

By rule 45: "Any member allowing his contributions, levies, and fines to run more than eight weeks in arrear shall have no claim on the funds, and will be suspended from all benefits until one month after all arrears are paid, and should any member allow his contributions, levies, &c., to be over six months in arrear he shall forfeit membership, and shall not be readmitted except on payment of the current entrance fee."

The rules further provide for the making of "levies" upon the members of the executive council to meet the requirements of certain disputes (rule 10), or to augment the funds of the federation when reduced so low as to be inadequate to meet the claims of the members (rule 53); but they nowhere provide for the making of levies for the purpose of providing the funds necessary for the maintaining of representatives in Parliament, except so far as such provision is made by rule 3, sub-r. 1, nor do they provide by whom such levies are to be made.

At the end of 1901, by the order of the executive council, a ballot was taken of all the members in each lodge upon the question whether there should be a general contribution of 1*s.* per annum to a federation parliamentary representation fund, and the result of that ballot shewed a large majority of the federation in favour of each member contributing 1*s.* a year to that fund. The plaintiff, who became a member of the federation in 1900, voted at the ballot against the proposal. Subsequently, in January, 1902, at the annual conference held under rule 16, a similar resolution was carried by a large majority of the delegates of the lodges present. In pursuance of that resolution the officers of each lodge received payments of 1*s.* per annum from the members, and the plaintiff made all such payments from January, 1902, to January, 1906, amounting to 4*s.* in all. In making those payments he did not act under compulsion, and he made no protest at the time of making them. In January, 1906, he brought this action in the county court against the South Wales Miners' Federation, and against the president, vice-president, and trustees of the federation, claiming repayment of the 4*s.* so paid by him; an injunction to restrain the defendants from levying money under rule 3, sub-r. 12, from the plaintiff or other members of the federation; a declaration that rule 3, sub-r. 12, is illegal; and an injunction to restrain the defendants from misapplying the funds of the federation in returning representatives to, or maintaining them in, Parliament. The county court judge held that rule 3, sub-r. 12, was not illegal or ultra vires, and that the plaintiff was not entitled either to repayment of the money, or to the injunctions claimed, and he gave judgment for the defendants. The plaintiff appealed.

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

B. F. Williams, K.C., and *Lovat Fraser*, for the plaintiff. The plaintiff is entitled to an injunction to restrain the defendants from making the levy for the purposes of the parliamentary fund. Rule 3, sub-r. 12, which relates to the formation of that fund, is ultra vires and illegal. At common law trade unions, being combinations in restraint of trade, were for all purposes illegal. The purposes of the unions are now legalized to the limited extent provided by the Trade Union Acts. By s. 16 of the Trade Union Act, 1876 (39 & 40 Vict. c. 22), the term "trade union" is defined to mean "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." A combination in restraint of trade may now lawfully exist for those purposes, but for no others; and the maintenance of members of Parliament is not one of them. If rule 3, sub-r. 12, is ultra vires, the plaintiff is also entitled to the second injunction claimed, to restrain the defendants from misapplying the funds that they had already raised. There is nothing in s. 4 of the Trade Union Act, 1871 (34 & 35 Vict. c. 31), to oust the jurisdiction of the Court to grant such an injunction, for the grant of it would not be a direct enforcement of any of the agreements in that section mentioned: *Yorkshire Miners' Association* v. *Howden*. (1) If, however, the formation of the parliamentary fund is not ultra vires, although the claim for the second injunction will fail, the claim for an injunction to restrain the making of future levies will still hold good, for there is no machinery provided by the rules of the federation for enforcing payment of the money demanded. In the absence of express direction in the rules there is no power to make a compulsory levy.

Rufus Isaacs, K.C., and *Bailhache*, for the defendant federation. The judge was right in refusing the injunctions. With respect to the second injunction, to restrain the defendants from

(1) [1905] A. C. 256.

misapplying the existing funds, it is a mistake to suppose that s. 16 of the Act of 1876 makes illegal all purposes not therein specified. It merely says that trade combinations for the purposes there named shall be trade unions within the meaning of the Act. Any purposes which were lawful at common law remain so still, and there was nothing at common law to prevent persons from combining to have their interests represented in Parliament. With regard to the other injunction, to restrain the making of levies for that purpose in the future, there are two objections. In the first place, the Court has no jurisdiction to entertain the claim; its jurisdiction is expressly ousted by s. 4 of the Trade Union Act, 1871, which enacts that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely; . . . . (3.) Any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members." The present proceedings come within those terms. The real gravamen of the plaintiff's complaint is not the levy in the sense of making the demand, but the enforcement of it, in the event of his not paying, by the penalty provided by rule 45 in the shape of suspension from benefits or expulsion. In *Rigby* v. *Connol* (1) Jessel M.R. held that wherever by the rules of a union the funds of the union are under certain circumstances to be applied in providing benefits to members, which is the case here under rule 3, sub-r. 7, the contract between the union and its members is an "agreement for the application of the funds of the trade union to provide benefits to members" within the meaning of the section, and that an application to the Court for an injunction to restrain the union from expelling a member from the union and thereby depriving him of participation in benefits was a "legal proceeding instituted with the object of directly enforcing" that agreement. That case was followed by the Court of Appeal in *Chamberlain's Wharf* v. *Smith* (2), and was not dissented from by the House of Lords in *Yorkshire Miners' Association* v. *Howden.* (3) Secondly, the contention of the

(1) (1880) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.
(3) [1905] A. C. 256.

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

plaintiff that there is no power under the rules to make a levy for this particular purpose is ill founded. The rules do authorize the making of the levy. Rule 3, sub-r. 1, specifies as one of the objects the providing of funds by various means, one of which is "levies." And amongst the funds so to be provided is that mentioned in sub-r. 12, for the payment of the expenses of representatives in Parliament. Those two sub-rules together confer the power to make the levy, though admittedly there is no provision in the rules as to how that power is to be exercised. The mode which the union choose to adopt for its exercise is merely a matter of internal administration with which the Court will not interfere, for the simple reason that the only result of such interference would be that the union would at once get rid of the defect by passing a rule to provide the machinery: *Macdougall* v. *Gardiner*. (1) In that case Mellish L.J. said (2): "If the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is that a meeting has to be called, and then ultimately the majority gets its wishes." In *Howden's Case* (3) the difficulty could not have been got rid of by a resolution of the members. The application of the funds there sought to be restrained was altogether outside the purposes authorized by the rules, and amounted to a breach of trust; and on that ground the case is distinguishable.

S. T. Evans, *K.C.*, and *Sankey*, for the other defendants.

B. F. Williams, *K.C.*, in reply.

DARLING J. This is an appeal from the decision of the county court judge sitting at Tredegar in favour of the defendants in an action brought by the plaintiff, a collier and member of the South Wales Miners' Federation, against that federation and its officials for a declaration that rule 3, sub-r. 12, of the defendants'

(1) (1875) 1 Ch. D. 13. (2) Ibid. at p. 25.
(3) [1905] A. C. 256.

rules, which purports to authorize the defendants to provide funds for maintaining representatives in Parliament, is ultra vires, and for injunctions to restrain the defendants from applying any of their existing funds for that purpose, and to further restrain them from collecting money for that purpose in the future from the plaintiff or other members of the Federation against their will. In the first place, it was contended on behalf of the plaintiff that the rule in question was illegal as being altogether outside the purposes for which a trade union can lawfully exist. The term "trade union" is defined by s. 16 of the Trade Union Act, 1876, to mean "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." And it was said that the lawful purposes of a trade union are limited to the purposes there defined, which, it was said, do not include anything of the nature indicated by rule 3, sub-r. 12. I do not think that is the effect of s. 16. The definition was not intended to be exhaustive, or to prevent an association from lawfully doing other acts beyond those there mentioned. It is significant that the section is silent about providing benefits for members, which is one of the recognized branches of trade union business. So that even if the purposes mentioned in rule 3, sub-r. 12, do not come within those specified in s. 16, there is nothing in that section to render them illegal. But, further, I am of opinion that they do fall within those specified in s. 16. It seems to me that one of the ways of regulating the relations between workmen and masters, or workmen and workmen, or masters and masters, is to get laws passed by Parliament for their regulation, and that one of the first steps towards getting those laws passed would be to send a representative to Parliament to promote a Bill for that purpose. On both these grounds I am of opinion that rule 3, sub-r. 12, is a valid rule, and that, in consequence, there is no

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

Darling J.

ground for an injunction to restrain the defendants from applying any of their existing funds for the purposes of that rule. But then it was contended for the plaintiff that, even if that rule is not illegal, still, as regards future levies for the purposes of that rule, he is entitled to an injunction to restrain the defendants from making them upon the ground that there is no machinery provided by the rules for the making of such levies. But to that contention two answers have been put forward by Mr. Isaacs. First he says that the Court has no jurisdiction to entertain the application by reason of s. 4 of the Trade Union Act, 1871, which provides that "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing . . . . (3.) Any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members." He says that, as the refusal by the plaintiff to pay the levy would be enforced ultimately by expulsion or deprivation of the benefits of the society, a proceeding to restrain the defendants from making and enforcing the levy would be a proceeding for directly enforcing the agreement which he made with the society as to his right of participating in the benefits. On that subject several cases have been referred to; but I do not wish to discuss them, or to express any opinion as to how far those cases are in conflict or whether *Chamberlain's Wharf* v. *Smith* (1) has been overruled by *Yorkshire Miners' Association* v. *Howden* (2), for I think it is unnecessary for the purposes of this case to do so. In my opinion Mr. Isaacs' second answer is sufficient to dispose of this case, namely, that the application for an injunction here is a request to the Court to interfere in what is a mere matter of internal administration of the society, and as such is covered by the decision of the Court of Appeal in *Macdougall* v. *Gardiner*. (3) The proposed levies may be irregular in the sense that the manner in which they are to be made is not expressly provided for, but, being for purposes authorized by the rules, they are not in any way illegal, and the majority of the members of the federation have assented to the levies being made. In those circumstances we are being

(1) [1900] 2 Ch. 605. (2) [1905] A. C 256.
(3) 1 Ch. D. 13.

asked to do what the Court in *Macdougall* v. *Gardiner* (1) declined to do. For these reasons I am of opinion that the appeal must be dismissed.

PHILLIMORE J. I agree that this appeal fails. I will deal first with the injunction to restrain the defendants from misapplying the funds of the federation by paying the expenses of returning representatives to Parliament and maintaining them. It is said on behalf of the plaintiff that such an object must be outside the scope of any trade union because the scope of trade unions was defined by s. 16 of the Act of 1876, and no other objects could be admitted to be within it. My brother Darling thinks that, even if that were so, rule 3, sub-r. 12, would be within the objects contemplated by s. 16. It is unnecessary for me to say whether I concur in that view or not, because I am clearly of opinion that s. 16 is not a limiting section at all. It says that any association which has any of the objects specified in the section as one of its objects is ipso facto a trade union, but there is nothing in it to prevent such a body from having a great number of additional objects besides. I believe that since 1871, if not before, the collection and administration of benefit funds has been one of the objects of a great many, if not most, trade unions, and there is nothing about that in s. 16. Therefore I see no reason why this trade union should not have as one of its objects that which is expressed in rule 3, sub-r. 12, for there is nothing in that rule which is illegal at common law. I am of opinion, therefore, that that injunction cannot be granted.

I now come to the other injunction, to restrain the defendants from levying money in the future under the rule from the plaintiff or other members of the federation. The first answer to that made on behalf of the defendants is that the Court has no jurisdiction to entertain the application. It is said that what it is really sought to restrain is the enforcement of the levy by the sanctions which the union has at its disposal, such as suspending the plaintiff from benefits and ultimately expelling him from the union, and that the act of the union in depriving a member of benefits is a matter which the Court is

(1) 1 Ch. D. 13.

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

Phillimore J.

forbidden by s. 4 of the Act of 1871 to restrain. No doubt the decisions in *Rigby* v. *Connol* (1) and *Chamberlain's Wharf* v. *Smith* (2) warrant that contention, and as the latter is a decision of the Court of Appeal, if it stands it is binding on us. But after the decision in *Yorkshire Miners' Association* v. *Howden* (3) in the House of Lords, I think it is very difficult now to regard *Chamberlain's Wharf* v. *Smith* (2) as being good law. In *Howden's Case* (3) the plaintiff was allowed, in virtue of his proprietary interest in the funds of the union, to maintain an action to prevent their diversion to an unauthorized purpose. But if a member can get an injunction to prevent their going to an unauthorized person, surely he may equally get an injunction to prevent his being excluded from all share in the benefit of them, and that is what would ultimately be the result of the proposed levies if permitted to be made.

However, it is not necessary for me to decide the question whether *Chamberlain's Wharf* v. *Smith* (2) is or is not now good law, because I agree with Darling J. that the plaintiff's case here fails upon the other ground relied on by the defendants. There are limits to the extent to which a Court will interfere with the internal administration of an association. If the Court is satisfied that a clear majority of the members, with an unpacked meeting and a regular vote, have arrived at some conclusion as to the management of the association, which is within the scope of the memorandum of association of the company or the purposes of the trade union, as the case may be, it will not interfere merely because some formal step was omitted which ought to have been taken to make the act of the association regular and complete. Now rule 3, sub-r. 1, declares that the federation may raise the funds authorized by the rules, including funds for paying the expenses of representatives in Parliament by means of "entrance fees, contributions, levies, donations and fines." It will be observed that the conjunction there used is "and," not "or," and, having regard to that language, I think we should be unduly limiting the powers of the association if we were to say that they must raise funds for one object by contributions and

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.
(3) [1905] A. C. 256.

1907

STEELE v. SOUTH WALES MINERS' FEDERATION.

Phillimore J.

for another by levies. I think the intention was that they might raise funds for any one of the authorized objects by any one of the means specified. It was intended that somebody should be able to make a levy for this fund, though who that somebody is is not indicated in the rules. I cannot say which organ of the trade union has the power to make the levy, nor whether any one organ or authority can do it by itself; but here we have all the authorities, executive council, lodge officers, and the majority of the members and the conference of delegates all agreeing that it should be done, and in those circumstances I think the action of the lodge officials in making the levy ought to be supported and the injunction refused.

Appeal dismissed.

Solicitors for plaintiff: *Ward, Bowie & Co., for Harley Downs, Cardiff.*

Solicitors for defendants: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1907

Jan. 14.

EDMONDSON *v.* BIRCH & CO., LIMITED AND HORNER.

Defamation—Libel—Privileged Occasion—Publication to Clerks of Company exercising Privilege—Reasonable and ordinary Course of Business.

Where a business communication containing defamatory statements concerning the plaintiff was made by the defendants, a company, to another company, on a privileged occasion, and, for the purpose of, and incidentally to, the making of the communication, the defamatory statements were, in the reasonable and ordinary course of business, published to clerks of the defendant company:—

Held, that the privileged occasion covered such a publication of those statements, which was therefore not actionable.

Boxsius v. *Goblet Frères*, [1894] 1 Q. B. 842, followed.

Pullman v. *Hill & Co.*, [1891] 1 Q. B. 524, discussed and distinguished.

APPLICATION by defendants for judgment or a new trial in an action tried by Lawrance J. with a jury, and cross application for a new trial by the plaintiff.

C. A. 1907

EDMONDSON v. BIRCH & CO., LIMITED AND HORNER.

The indorsement on the writ claimed damages for libel and slander.

The statement of claim, in substance, stated that on March 19, 1904, the plaintiff was by verbal agreement engaged by Messrs Birch, Kirby & Co., Limited, of Kobe, Japan, on trial as their mineral manager and adviser, at a monthly salary of 150 yen (15*l.* English money), and that at the same time it was further verbally arranged that Messrs. Birch, Kirby & Co., Limited, should immediately communicate with the defendant company in London to ascertain if they approved the engagement, and, subject to such approval, they agreed that, if, after three months' trial, they were satisfied with the conduct and ability of the plaintiff, they would continue him in their permanent employ at an increased salary, to be subsequently agreed upon, in addition to which the plaintiff was to have a share of profits arising from the mineral department of their business; that the plaintiff entered into the service of Messrs. Birch, Kirby & Co., Limited, in pursuance of the said agreement; that on May 7, 1904, the defendant Horner, as managing director of the defendant company, and for and on behalf of that company, falsely and maliciously wrote and published, or caused to be written and published, of the plaintiff, and of him in respect of his employment, in a letter of that date sent by the defendants to Messrs. Birch, Kirby & Co., Limited, of Kobe, Japan, the following words: "We are much afraid that he" (meaning the plaintiff) "may acquire valuable information at your expense, and use it not for your benefit but his own"; that on June 22, 1904, the defendant Horner, as such managing director as aforesaid, and for and on behalf of the defendant company, falsely and maliciously wrote and published, or caused to be written and published in London, in the form of a message written for transmission by cable, and addressed to Messrs Birch, Kirby & Co., Limited, Kobe, Japan, of and concerning the plaintiff in respect of his employment with the said Messrs. Birch, Kirby & Co., Limited, the following code words: "Eereplaats Edmondson Epulotico," which meant, and were understood to mean by those to whom they were published, "Have no dealings with Edmondson; give notice of dismissal"; that by the words so published as aforesaid the defendants meant, and were

understood to mean, that the plaintiff was untrustworthy and dishonest, and not a man of business integrity fit to be employed in a responsible business capacity; and that, in consequence of such publications, the said Birch, Kirby & Co., Limited, refused to continue the plaintiff in their employment, and the plaintiff was injured in his credit and reputation. The defence set up was that the matters complained of were published on a privileged occasion bona fide and without malice. There was no plea of justification.

It appeared that the defendant company, and an English company, called Birch, Kirby & Co., Limited, carrying on business at Kobe, in Japan, had business relations and acted as agents for one another, several directors of one company being also directors of the other. The defendant Horner was managing director of the defendant company. An arrangement having been entered into between the plaintiff and Birch, Kirby & Co., Limited, as stated in the statement of claim, that company, in pursuance of that arrangement, communicated with the defendant company in London, to ascertain whether they approved of the engagement of the plaintiff, and a correspondence in consequence took place, in the course of which the letter and telegram complained of in the statement of claim were sent. The letter was in the following terms: "We have your letter of April 6, referring to your arrangement with Mr. Edmondson, and we confirm our last to you of April 23, in which we referred to this gentleman. We can only repeat what we then said, but we are writing to a friend of ours who knew him some time ago, and as soon as we get his reply we shall communicate it to you. We are much afraid that he may acquire valuable information at your expense and use it not for your benefit but his own. We hope, however, that it may be otherwise." It appeared that the defendant Horner had dictated the terms of the letter to a shorthand clerk in the defendant company's employ, who took them down in shorthand, and then type-wrote the letter, which Horner signed, and of which a copy was inserted in the defendant company's copy letter-book. The defendant Horner also dictated the terms of the telegram to a clerk in the employ of the defendant

C. A. 1907

EDMONDSON v. BIRCH & CO., LIMITED AND HORNER.

company, selecting from the terms of one of the codes available for the purpose of telegraphing to Japan the terms set forth in the statement of claim, which had the code meanings therein alleged. It appeared that the defendant company had a private code, which they used for the purpose of communicating business information to the company in Japan, but it contained no terms suitable for conveying the meaning which the defendant Horner wished to convey, and that the term "Eereplaats," which means "Have no dealings with," was the word most nearly suitable in any code available for that purpose. A copy of the telegram, with a translation of the code terms used in it, was inserted in the defendant company's cable-book. The defendant Horner, who was called for the plaintiff, gave evidence to the effect that the dictating of the terms of the letter and telegram to a clerk, and the entry of copies in the letter-book and cable-book, were in accordance with the necessary and usual course of business.

The learned judge held that the communications to Birch, Kirby & Co., Limited, were made on a privileged occasion, and that there was no evidence of any actual malice on the part of the defendants to rebut the privilege; but he held, on the authority of *Pullman* v. *Hill & Co.* (1), that there had been a publication of the defamatory matter to the defendant company's clerks and, as regards the telegram, to the telegraph clerks, which was not covered by the privileged occasion, and he therefore left the case to the jury in respect of that publication, and the jury assessed the damages at 80*l.*, for which sum judgment was entered for the plaintiff.

Montague Lush, K.C., and *J. R. Atkin, K.C.*, for the defendants. The learned judge was wrong in holding that the privilege conferred by the occasion did not cover the communication of the matter complained of to the clerks of the defendant company and the telegraph clerks, that communication being made in the reasonable and ordinary course of business: see *Boxsius* v. *Goblet Frères* (2), in which the decision in *Pullman* v. *Hill & Co.* (1) was explained as having depended on the fact that, under the particular circumstances of that case, the communication

(1) [1891] 1 Q. B. 524. (2) [1894] 1 Q. B. 842.

of the matter complained of to the clerk could not be considered as having been reasonably necessary or in the ordinary course of business. In *Williamson* v. *Freer* (1) the publication of libellous matter in a telegram was held not to be privileged on the ground that in that case it was not necessary to send the communication by telegram. Under the circumstances of the present case it was reasonable to communicate by telegraph with the company in Japan. [They also cited *Lawless* v. *Anglo-Egyptian Cotton Co.* (2)]

There was no evidence whatever of any actual malice on the part of the defendants.

Marshall-Hall, K.C., and *A. S. Poyser*, for the plaintiff. The case of *Pullman* v. *Hill & Co.* (3) is really on all fours with the present case. The decision in the case of *Boxsius* v. *Goblet Frères* (4) turned on the fact that the defendants to whom the decision related were solicitors, and that, in the ordinary course of a solicitor's business, it was his duty to make such a communication as that complained of to his clerks. It could not have been reasonably necessary in the present case to make the communication through the medium of clerks or to enter the letter and the telegram with a translation in the letter-book and cable-book. The defendant Horner should in such a case have written the letter and telegram, and sent the telegram, himself. The communication to the company in Japan should not have been sent in a code telegram the terms of which the telegraph clerks in Japan would understand, or could easily decipher. It would have been quite sufficient for the defendants' purpose if the code word "Epulotico," which means "give notice of dismissal," had been used alone without the word "Eereplaats," which means "Have no dealings with," an expression which was calculated to convey a most injurious impression as to the plaintiff.

The learned judge ought to have left to the jury the question whether the defendants were actuated by actual malice in making the communications to Birch, Kirby & Co., Limited. The use of such an expression as "Have no dealings with Edmondson" unnecessarily, and the words in the letter, "We are much

(1) (1874) L. R. 9 C. P. 393.
(2) (1869) L. R. 4 Q. B. 262.
(3) [1891] 1 Q. B. 524.
(4) [1894] 1 Q. B. 842.

C. A. 1907

EDMONDSON v. BIRCH & CO., LIMITED AND HORNER.

afraid that he may acquire valuable information at your expense, and use it not for your benefit but his own," which import a most offensive suggestion as affecting a man in the plaintiff's position, and which went beyond anything called for by the occasion, were some evidence of actual malice, which ought not to have been withdrawn from the jury. [They also cited *Tuson* v. *Evans* (1) and *Spill* v. *Maule*. (2)]

Montague Lush, *K.C.*, was not called upon to reply.

COLLINS M.R. This is an application for judgment or a new trial in an action tried before Lawrance J. with a jury. The action was for libel, and the defence set up was, in substance, privilege. It appears to me that, when the facts are sifted and ascertained, the case is really a very clear one. The action was originally based only upon the words of the telegram mentioned in the statement of claim, but subsequently the statement of claim was amended by adding a claim in respect of a letter written by the defendants. The letter, however, related to the same subject-matter as the telegram, and the same law appears to me to be applicable to both documents. The circumstances under which they were published were as follows. The defendants were a company in London, having business relations with a company in Japan, which acted as their agents and correspondents in that country. The plaintiff had been temporarily engaged by the company in Japan as their manager on trial, and the arrangement between the plaintiff and that company is stated in the statement of claim as follows: "On March 19, 1904, the plaintiff was by verbal agreement engaged by Messrs. Birch, Kirby & Co., Limited, of Kobe, Japan, on trial as their mineral manager and adviser at a monthly salary of 150 yen (15*l*. English money). At the same time it was further verbally arranged that Messrs. Birch, Kirby & Co., Limited, should immediately communicate with the defendant company in London to ascertain if they approved the engagement, and, subject to such approval, they agreed that if, after three months' trial, they were satisfied with the conduct and ability of the plaintiff, they would continue him in their permanent employ at an increased

(1) (1841) 12 A. & E. 733. (2) (1869) L. R. 4 Ex. 232.

salary to be subsequently agreed upon, in addition to which the plaintiff was to have a share of profits arising from the mineral department of their business." In consequence of this arrangement the letter of May 7, which was one of the libels complained of, was written by the defendant company to the company in Japan. The letter, a copy of which was entered in the defendant company's copy letter-book, was in these terms. [The Master of the Rolls then read the letter.] This letter was followed by a telegram, sent to Japan in the terms of a code, which, when decoded, reads thus: "Have no dealings with Edmondson; give notice of dismissal." This telegram, with the translation of it, was copied into the defendant company's cable-book, and constituted the second libel complained of by the plaintiff. The telegram appears to have been couched in the terms in which it was, because they were the nearest code terms available for the purpose of conveying the required meaning. The learned judge held that the occasion on which the letter and telegram were published to the company in Japan was privileged, and that there was no evidence of any actual malice to take away the privilege; but, although that was so, he was of opinion, upon the authority of *Pullman* v. *Hill & Co.* (1), that there had been a publication of the statements complained of which did not fall within the privilege, because it was made to persons who had no correlative interest in the matter, by way of intermediaries, namely, the clerks in the defendants' own office, who took down the communications to be sent to the company in Japan and wrote them out, and, as regards the telegram, the telegraph clerks. He therefore left the case to the jury, with the result that they gave the plaintiff a verdict for 80*l.* damages. The defendants now apply for judgment or a new trial on the ground that the occasion was privileged, and that privilege covered the publication to which I have just alluded.

It seems to me that the learned judge took too high a view of the effect of the authority upon which he acted, namely, *Pullman* v. *Hill & Co.* (1) That decision related to a communication made by the defendants, a limited company, to the plaintiffs, a partnership firm, which involved a serious charge

(1) [1891] 1 Q. B. 524.

C. A. 1907

EDMONDSON v. BIRCH & CO., LIMITED AND HORNER.

Collins M.R.

against the plaintiffs. This communication was made by a letter which was dictated by the defendants' managing director to a clerk; and the Court held that, under the circumstances, it was not necessary, or in the ordinary course of business, for the director to have availed himself of the clerk for the purpose of making the communication complained of, and therefore it was not privileged. The question which we have to decide is whether that case, as subsequently explained and qualified in *Boxsius* v. *Goblet Frères* (1), is an authority which concludes the present case in favour of the plaintiff. On reference to the judgment of Lord Esher M.R. in the later case it will be seen how he qualified and distinguished the decision in the earlier case, to which he was himself a party. He said: "In the case of *Pullman* v. *Hill & Co.* (2) this Court held that, if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. We so held on the ground that it does not fall within the ordinary business of a merchant to write such defamatory statements, and that, if he does so, it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office. The question here arises in the case of a solicitor instructed by a client to obtain payment of a bill, and to press the person who is charged with payment of the bill to the extent of asserting that he has been trying to evade payment by at the least a shabby trick, and possibly by a criminal action. The first point taken is that that is not a matter within the ordinary business of a solicitor. This is an argument which a few days ago we overruled in another case, where it was said that the business of a solicitor was to conduct actions; but the Court pointed out that it was also part of the ordinary business of a solicitor to endeavour to secure the money due to his client by taking steps not necessarily arising in an action." Lord Esher then went on to deal with the very point raised in this case: "Then it is said that the solicitors cannot claim privilege as between themselves and the typewriting clerk who took down

(1) [1894] 1 Q. B. 842. (2) [1891] 1 Q. B. 524.

the letter and the copying clerk who copied it into the letter-book. Such an argument requires consideration; but it seems to me to come to this. It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence, and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office, and copied into the letter-book. It is necessary to keep a record of the transaction, one reason being that there may be a check on the bill of costs. Such a case seems to me to be distinguishable from that of a merchant who is writing a libel out of the course of his ordinary business, who, if he has the letter copied by a clerk, does this at his own risk."

Lopes L.J., who was also a party to the judgment in *Pullman* v. *Hill & Co.* (1), gave judgment to the same effect. He said: "If a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of the client, the occasion is privileged. In the present case, if the communication had been made direct to the plaintiff, it would have been made on a privileged occasion; and, though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication; it was usual to do so in the course of business, and it was in the interest of the client that it should be made. The decision in *Pullman* v. *Hill & Co.* (1) was pressed upon us; but to my mind that case is distinguishable. The ground of the decision was, that it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk in the office." It seems to me that, such being the more recent authorities, the case of *Pullman* v. *Hill & Co.* (1) did not govern the present case as the learned

(1) [1891] 1 Q. B. 524.

C. A. 1907

EDMONDSON v. BIRCH & Co., LIMITED AND HORNER.

Collins M.R.

judge supposed. The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege. In the case of a solicitor, his duty in conducting the business of his client may be absolute, whereas in this case it may be said that the duty was only one of imperfect obligation, but the nature of the obligation which gives rise to the privilege cannot, I think, alter its effect in this respect. If the duty is such as to give rise to a privileged occasion, then the fact that it is only one of imperfect obligation cannot affect the mode in which the privilege may reasonably be exercised. In the case of *Boxsius* v. *Goblet Frères* (1) Davey L.J. said that the decision at which the Court was arriving was justified by the earlier authorities. I think that the only one of those earlier authorities to which I need refer is the case of *Lawless* v. *Anglo-Egyptian Cotton Co.* (2) In that case the directors of a company had caused a report, which was to be made to a meeting of shareholders, and which contained matter defamatory of the plaintiff, to be printed for circulation among all the shareholders, and the question arose whether the communication of that matter to the printer was privileged; and it was held that it was, because the printing of the report was the ordinary and reasonable mode of doing what the occasion entitled the company to do, namely, communicate the report to the shareholders. That seems to involve the decision of the very point raised in the present case, namely, that the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it. In the present case there was, in addition to the ordinary business relation between the defendants and the company in Japan, a special relation created by the arrangement made by the plaintiff himself with the latter company to the effect that his engagement by them was to be subject to the approval of the defendant company. There was, therefore, an

(1) [1894] 1 Q. B. 842. (2) L. R. 4 Q. B. 262.

obligation imposed on the defendants in the matter at the instance of the plaintiff himself, which involved communications on the subject from the defendant company to the company in Japan, which communications might necessarily have to be made by telegraph, inasmuch as, under the circumstances, it was obviously essential that the approval or disapproval of the engagement by the defendants should be communicated as promptly as possible. The only witness with regard to the mode in which the communications with the company in Japan were carried out was the defendant Horner himself. He gave evidence to the effect that the communication by telegram was carried out in the only way available, and, so far as the evidence is concerned, it was all one way, namely, to the effect that, as a matter of business, the course followed in making the communications which had been made was the reasonable and usual course to adopt under the circumstances.

With regard to the cross application, the argument for the plaintiff seemed to be really founded on the fallacy that, because the matter contained in a document complained of is defamatory, that is in itself evidence of actual malice. It is of course assumed for the purposes of the defence of privilege that the document is to some extent defamatory. I agree that the language used may in some cases be so defamatory, and so far in excess of the occasion, as to be evidence of actual malice, and to shew that the publication of the defamatory matter was not a use, but an abuse of the privileged occasion. But the mere fact that language used is somewhat strong, or not altogether temperate, would not, in the absence of any indication that it was not used bona fide, be evidence of malice. On looking at the whole of the circumstances and the correspondence in this case, I can see no shadow of a reason for the suggestion that the privilege was in the present case abused. For these reasons I think that the application of the defendants to enter judgment must be allowed, and the cross application disallowed.

COZENS-HARDY L.J. I am of the same opinion, and I only wish to add this. I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the

C. A. 1907

EDMONDSON v. BIRCH & Co., LIMITED AND HORNER.

Cozens-Hardy L.J.

defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to shew that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business.

FLETCHER MOULTON L.J. I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

Judgment for defendants.

Solicitors for plaintiff: *Jacksons, Elwell & Curran.*
Solicitors for defendants: *Greenip, Snell & Co.*

E. L.

[CROWN CASE RESERVED.]

1906
Dec. 19.

THE KING *v.* AUDLEY.

Criminal Law—Indictment—Bigamy—Second Marriage contracted Abroad—No averment that Accused was a British Subject—Offences against the Person Act, 1861 (24 & 25 *Vict.* c. 100), *s.* 57.

On a trial for bigamy where the second marriage has been contracted elsewhere than in England or Ireland it is not necessary that the indictment should contain an averment that the accused was a British subject.

Case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by Kennedy J.

The prisoner was tried at the Winchester Autumn Assizes on a charge of bigamy. The indictment alleged that the prisoner married Mary Anne Callaway at the Wesleyan Chapel, Hope Street, Sheerness, on August 23, 1905, and that on March 10, 1906, his said wife being then alive, he married Ellen Guilfoyle at the Catholic Church of St. Mary Crowned at Gibraltar.

The indictment did not contain an averment that the accused was a subject of His Majesty. The evidence adduced at the trial was, in the judgment of the learned judge, sufficient to fulfil the requirements of 24 & 25 Vict. c. 100, s. 57 (1), namely, to

(1) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place; Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

1906

REX v. AUDLEY.

shew that the accused was a subject of His Majesty and had at Gibraltar on the date alleged contracted a marriage with Ellen Guilfoyle in the lifetime of his lawful wife.

The jury found the prisoner guilty, and he was sentenced to twelve months' imprisonment with hard labour, but execution of the judgment was respited until the decision of the question reserved by this case, namely, whether the indictment was bad and ought to be quashed by reason of the omission of an averment that the accused was a British subject.

F. E. Bray, for the prisoner. The indictment is bad in that it does not aver that the prisoner was a British subject. Every averment which is necessary to bring the prisoner within the statute must appear on the face of the indictment, and in the case of a second marriage contracted abroad the section, in terms, provides that it shall not apply if the person contracting the marriage is not a subject of His Majesty. If, therefore, the second marriage is proved to have been contracted abroad, the prosecution must fail unless it is proved that the accused is a British subject, and this shews that there is a distinction between the first part of the proviso in the section and the matters dealt with in the later part, which are purely matters of defence, and which consequently need not be averred in the indictment. The rule that it is not necessary for the prosecution to negative a proviso only applies where the averment, which would otherwise have to be made by anticipation, is a negative averment, and no case can be found where an indictment was held good in spite of the absence of a positive averment.

[He referred to *Rex* v. *James* (1); *Rex* v. *Theed* (2); *Rex* v. *Baxter*. (3)]

Avory, K.C. (*Swinburne-Hanham* with him), for the prosecution. No good reason can be suggested why, if it is necessary to aver in an indictment for bigamy that the accused is a British subject, it is not also necessary to aver all the other matters referred to in the proviso to the section, but no one has ever heard of an indictment for bigamy containing, for example, an

(1) [1902] 1 K. B. 540. (2) (1724) 1 Strange, 608.
(3) (1792) 5 T. R. 83; 2 Leach, 578.

averment that the accused has not been divorced. The gist of the offence is the second marriage, and if that is proved to have been contracted abroad the prisoner is in the same position as any other person charged with an offence within the jurisdiction, that is, he is assumed to be a British subject until the contrary be shewn. Otherwise it would be necessary to aver and prove in every criminal case that the accused was a British subject. The question is, moreover, concluded by authority, for this very same point arising on the same section was urged without success in *The Trial of Earl Russell* (1), where, as appears from the shorthand notes of the proceedings, counsel for the defendant contended as follows: "This indictment upon its face alleges that the offence was committed in a foreign country; it does not upon its face allege that it was committed by a subject of the King; it does not upon its face allege that the accused at the time of the commission of the offence was a subject of the King; and therefore upon its face I say it is bad, even if the statute would apply to a second marriage contracted abroad by a subject of the King." It was also held in *Reg.* v. *Jameson* (2) that it was unnecessary for the indictment to contain an averment that the defendants were British subjects.

[He was stopped.]

Bray replied.

LORD ALVERSTONE C.J. The Court is very much indebted to Mr. Bray for having put his point in so clear and able a manner, but both on authority and principle we are all of opinion that the conviction must be affirmed. It is not necessary to discuss the authorities at any length, because we dealt fully with them when considering a similar kind of question in *Rex* v. *James*. (3) I will merely refer to the passages from the judgments in *Rex* v. *Jarvis* (4), quoted in *Rex* v. *James* (3), where Lord Mansfield C.J. said: "It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not

(1) [1901] A. C. 446.
(2) [1896] 2 Q. B. 425, at p. 431.
(3) [1902] 1 K. B. 540.
(4) (1754) 1 East, 643, n., at p. 646, n.

1906

REX v. AUDLEY.

Lord Alverstone C.J.

fall within any of them"; and Denison J. said (1): "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the Act"; and in *Reg.* v. *James* (2), having reviewed all the authorities, we pointed out that: "It is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." In other words, we decided that to be law as to which Parke B. expressed a doubt in *Thibault* v. *Gibson* (3), namely, that the same rule applies even where the exception comes by way of proviso in the same section which creates the offence.

In the present case the offence is created by s. 57 of the Offences against the Person Act, 1861, which provides that: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony." The offence, therefore, is the second marriage in the lifetime of the first wife. Then comes the proviso that, "Nothing in this section contained shall extend to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of Her Majesty," followed by certain other exceptions. If it be necessary to aver in the indictment that the accused is a British subject I can see no reason why it should not also be necessary to negative all the other matters covered by the exceptions in the proviso. Mr. Bray made the ingenious suggestion that the rule as to not pleading exceptions only applies where the exception is a negative one. It is quite true that in *Rex* v. *Baxter* (4), one of the cases relied on by Mr. Bray, the question arose on the omission of a negative averment, but it was pointed out by Buller J. in that case that the reason why it was unnecessary for the indictment to contain that negative averment was that it was a matter of

(1) 1 East, at p. 647, n.
(2) [1902] 1 K. B. at p. 545.
(3) (1843) 12 M. & W. 88, at p. 96.
(4) 5 T. R. 83; 2 Leach, 578.

1906

REX v. AUDLEY.

Lord Alverstone C.J.

evidence to be proved by the defendant. In my opinion there is no substance in the argument that a different rule applies in the case of positive averments. In either case the real question is, is the particular allegation a matter of defence or a matter which must be proved by the prosecution in order to establish that the offence has been committed, and in the latter case only need the indictment contain the averment. In the case of bigamy the prosecution is not bound to assume that the accused is not a British subject, but if in the course of a trial it turned out that the accused was a foreigner, then, as Lord Russell of Killowen C.J. said in *Reg.* v. *Jameson* (1), every opportunity would be given to his counsel to take that objection and to give legal effect to any defence attributable to that fact. Further, it appears from the shorthand notes of the proceedings on *The Trial of Earl Russell* (2) that in that case the point arose under this very statute, where the objection does not seem to have been treated with very much respect.

GRANTHAM J. I agree.

LAWRANCE J. I am of the same opinion.

BIGHAM J. The gist of the offence of bigamy is the second marriage during the first wife's lifetime, and when that fact has been established by the prosecution the case is complete. The fact that the accused is not a British subject and the other matters specified in the proviso to s. 57 are all matters of confession and avoidance, and they must be alleged and proved by the defence.

BUCKNILL J. I agree.

Conviction affirmed.

Solicitor for prosecution : *Treasury Solicitor.*

(1) [1896] 2 Q. B. at p. 431. (2) [1901] A. C. 446.

F. O. R.

1906
Dec. 19.

[CROWN CASE RESERVED.]

THE KING *v.* DE MARNY.

Criminal Law—Obscene Libel—Publication—Aiding and Abetting—Advertisements in a Newspaper.

The defendant inserted in a newspaper of which he was the editor advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received in return from the advertisers, who were foreigners resident abroad, obscene books and photographs. The defendant was tried on an indictment charging him with causing and procuring obscene books and photographs to be sold and published, and to be sent by post contrary to the Post Office (Protection) Act, 1884, s. 4. The defendant was convicted:—

Held, that the conviction was right.

Case stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Common Serjeant.

The defendant was tried at the Central Criminal Court on an indictment charging him in several counts with selling and publishing, and causing and procuring to be sold and published by certain named persons, divers obscene books, papers, and photographs. The indictment also contained a series of counts charging him with sending, and causing and procuring to be sent by certain named persons, certain postal packets containing obscene books, papers, and photographs contrary to the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 4.

It was proved that the defendant was the editor of a newspaper called *Judy*, and that he inserted and published in that newspaper advertisements of several persons in England and abroad, offering for sale books, catalogues, and photographs. The chief inspector of police wrote to the addresses given in the advertisements and received in return from the persons or firms mentioned in the indictment, who were all resident abroad, postal packets containing books, catalogues, and photographs of the most obscene character. The defendant had been warned several times by the police authorities that the books, photographs, and other things advertised in his paper in the same terms and by the same persons were of an obscene character, and

1906

REX v. DE MARNY.

that one of the persons so advertising in his newspaper had been convicted for selling and publishing obscene libels. Counsel for the defendant submitted that there was no evidence to go to the jury that the defendant took part in or aided and abetted the selling and publishing of obscene libels as charged in the indictment.

The Common Serjeant held that there was evidence, and directed the jury that if they were satisfied that the books and photographs sent to the police inspector in pursuance of the advertisements were obscene, and that the defendant knew at the time he published the advertisements that they were advertisements for the sale of obscene literature and photographs, and that by the publication of these advertisements he brought about the sale and transmission to the inspector of the books and photographs, they ought to convict the defendant, although he did not know the actual contents of the books or the details of the photographs sent, and that in judging of the defendant's knowledge they might consider not only the evidence of the express warnings given to the defendant and the wording of each advertisement, but also the other advertisements appearing in the same issue of the paper.

The jury found the defendant guilty on all counts.

The question for the opinion of the Court was whether the conviction was right on all or any of the counts of the indictment.

Avory, K.C., and *J. P. Grain*, for the defendant. The conviction cannot stand. If the defendant is guilty, he is guilty of aiding and abetting the sale and publication of the indecent literature, and, the offence being a misdemeanour, he is liable to be indicted as a principal in the second degree; but the real vendors, who are the principals in the first degree, are all foreigners resident abroad, and they committed no offence against the English law in sending indecent literature to this country. If the act done by the principal in the first degree is one for which he could not be convicted, it follows that the principal in the second degree has been guilty of no offence. Further, by publishing the advertisements the defendant cannot be said to have procured in the legal

1906

REX v. DE MARNY.

sense the publication of the books sold, any more than a sandwich-man who advertises the performance of a stage play in a music-hall commits the offence of procuring the illegal representation of a stage play. Reliance is placed by the prosecution on the fact that the defendant knew that the advertisements related to obscene matter, but that knowledge is not evidence that he aided and abetted or procured the sale of the particular things specified in the indictment. In other words, the insertion of the advertisements, though it may have assisted the sale in a commercial sense, is legally too remote from the commission of the offence to constitute the editor of the newspaper an aider or abettor in the offence.

R. D. Muir and *L. W. Kershaw*, for the prosecution. It is a fallacy to say that the principals in the first degree in this case have committed no offence. The person abroad, whether a foreigner or not, who through his innocent agent, the postman, causes the publication of indecent literature in this country commits an offence against the law of England, and, if he came within the jurisdiction, could be convicted: *Rex* v. *Oliphant*. (1) The act of sending the books and photographs through the post is one continuous act, one portion of which is performed by the foreigner abroad and another by the postman in England, but the act of sending continues right up to the moment of delivery. In *Rex* v. *Burdett* (2), where a libel was written by the defendant in one county and delivered by the postal authorities in another, it was held that there was a publication by the defendant in the latter county; and at the date of that decision the same question arose as between different counties as now arises between England and a foreign country. Then, is there any evidence that the defendant aided and abetted or procured the sale or publication within s. 8 of the Aiders and Abettors Act, 1861 (24 & 25 Vict. c. 94)? The foreigner abroad desires to get customers in England. He can do so either by employing an agent or by advertising. In either case the effect is the same. The advertisement in the present case afforded that aid without which the vendor could not have committed the illegal act. The

(1) [1905] 2 K. B. 67.

(2) (1820) 1 St. Tr. (N.S.) 1, at pp. 114, 115; 4 B. & Ald. 95.

defendant knew that the advertisements related to indecent literature, and that sales would or might result from their insertion in his paper. It is immaterial that he may not have known the exact books or photographs that would be sold: *Reg.* v. *Cooper* (1); *Parkes* v. *Prescott.* (2)

[He was stopped.]

Avory, K.C., replied.

LORD ALVERSTONE C.J. The very able arguments which have been delivered on both sides enable me to come without any doubt to the conclusion that this conviction must be affirmed. The defendant for profit to himself inserted in his paper advertisements which give information to readers as to where certain publications can be obtained, and it is found as a fact that the defendant knew that the books and other things advertised were of an indecent character, and if one were at liberty to draw a conclusion from the advertisements themselves, there could be no doubt at all as to that. The Common Serjeant directed the jury in the following terms: [His Lordship read the direction of the Common Serjeant set out above, and continued:—] In my opinion that direction is stated as favourably as it could be for the defendant. The jury are told that in order to convict the defendant they must be satisfied that the defendant knew the character of the publications referred to in the advertisements, and that by publishing the advertisements he brought about the sale of the publications and other articles referred to. That amounts in ordinary language to aiding or abetting the publication in England of obscene literature, and the sending through the post in England a packet the sending of which is prohibited by the Post Office (Protection) Act, 1884. It would, in my opinion, be a lamentable state of things if the law of this country were not strong enough to deal with a man who has done so much towards bringing about the publication of indecent literature. The evidence in this case shews that the result of the insertion of the advertisements in the defendant's paper was to give information as to where these things could be obtained to persons who, but for the

(1) (1846) 8 Q. B. 533. (2) (1869) L. R. 4 Ex. 169.

1906

REX v. DE MARNY.

Lord Alverstone C.J.

advertisements, would or might never have known of their existence, and, therefore, it is not going too far to say that the publication was directly brought about by the act of the defendant, and it is further proved that the defendant had knowledge that that would be the consequence of inserting the advertisements in the paper. The argument which has been urged on behalf of the defendant seems to me to go too far, because it would equally apply if the defendant had himself caused the books to be printed abroad. In my opinion the direction of the Common Serjeant was in accordance with the law, and the cases of *Rex* v. *Oliphant* (1), *Rex* v. *Burdett* (2), and *Reg.* v. *Cooper* (3) are all authorities which afford illustration of the same principle, that in misdemeanours persons who, in the words of the statute, "aid, abet, counsel or procure" the commission of an offence are themselves principal offenders.

GRANTHAM J. I am of the same opinion. I doubted at first whether the law was strong enough to make the person who received money for publishing these advertisements liable in the same way as a person who himself sells indecent literature, but the authorities which have been cited to us by Mr. Muir satisfy me that the learned Common Serjeant rightly directed the jury. The conviction must therefore be affirmed.

LAWRANCE, BIGHAM, and BUCKNILL JJ. concurred.

Conviction affirmed.

Solicitor for defendant: *E. M. Lazarus.*
Solicitors for prosecution: *Wontner & Sons.*

(1) [1905] 2 K. B. 67.
(2) 1 St. Tr. (N.S.) 1, at pp. 114, 115; 4 B. & Ald. 95.
(3) 8 Q. B. 533.

F. O. R.

TORY *v.* MAYOR AND CORPORATION OF DORCHESTER.

1906
Dec. 19.

County Court—Costs—Taxation—Action against Public Authority—"Costs to be taxed as between Solicitor and Client"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 118—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *ss.* 1, 2.

Where in an action in a county court against a public authority for an act or neglect in the execution of its public duty a judgment is obtained by the defendant, the costs "to be taxed as between solicitor and client" given by s. 1 (*b*) of the Public Authorities Protection Act, 1893, must be taxed on the scale then in force in the county court, in accordance with s. 118 of the County Courts Act, 1888.

Appeal from the Dorsetshire County Court.

It appeared that the plaintiff had brought an action in the county court against the defendants for negligence in the execution of their public duty, which was tried before the county court judge and a jury, and the verdict and judgment were given for the defendants.

The defendants then carried in their bill of costs for taxation, and the registrar taxed the bill on the county court scale. The defendants appealed to the judge, contending that under the Public Authorities Protection Act, 1893, s. 1 (*b*), where judgment was obtained by the defendant in an action against a public authority it should carry costs to be taxed as between solicitor and client, and that the county court scale had no application. The county court judge agreed in this view, and held that the costs must be taxed as between solicitor and client irrespective of the county court scale.

The plaintiff appealed. (1)

(1) By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1: "Where after the commencement of this Act any action . . . . is commenced . . . . against any person for any act done in pursuance . . . . of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such . . . . duty, or authority; . . . .

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. . . . ."

By s. 2: "There shall be repealed . . . . so much of any public general Act as enacts that in any proceeding to which this Act applies . . . . (*d*) the defendant is to be entitled to any particular kind or amount of costs. . . . ."

By the County Courts Act, 1888

1906

TORY v. DORCHESTER CORPORATION.

J. A. Hawke, for the appellant. The county court judge was wrong in holding that the effect of s. 2 (*d*) of the Public Authorities Protection Act, 1893, was to repeal in regard to actions against public authorities, the provisions of s. 118 of the County Courts Act, 1888, relating to taxation of costs as between solicitor and client. The effect of s. 1 (*b*) of the Public Authorities Protection Act, 1893, is to give the successful defendant costs as between solicitor and client, but if the action has been tried in the county court those costs must be taxed according to the county court scale.

[He was stopped.]

C. F. Pritchard, for the respondents. The county court judge was right. Sect. 118 of the County Courts Act, 1888, has no application here. The registrar can only tax solicitor and client costs under that section on the application either of the solicitor or client: *Cubison* v. *Mayo*. (1) The public authority is not bound to apply to have the costs taxed. No doubt s. 1 (*b*) of the Public Authorities Protection Act, 1893, speaks of the costs as "costs to be taxed," but the registrar in taxing them is not bound by the county court scale of costs. Such a taxation would not be governed by the provision in s. 118, which is to that extent inconsistent with the Public Authorities Protection Act.

[He cited *Bournemouth Commissioners* v. *Watts*. (2)]

DARLING J. In this case it appears that the plaintiff had brought an action against the corporation of Dorchester in the county court. The corporation were successful, and he therefore had to pay their costs. The corporation claim that these costs should not be liable to taxation, and say that s. 118 of the County Courts Act, 1888, has no application whatever, and

---

(51 & 52 Vict. c. 43), s. 118, ". . . . All costs and charges between solicitor and client shall, on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the court . . . . and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force . . . . and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation.'

(1) [1896] 1 Q. B. 246.

(2) (1884) 14 Q. B. D. 87.

1906

TORY v. DORCHESTER CORPORATION.

Darling J.

the county court judge has so decided. He says: "I think the County Courts Act does not apply, but the Public Authorities Protection Act, 1893, does (s. 2), and I hold the costs must be taxed as between solicitor and client irrespective of the County Courts Act."

He does not therefore hold that the defendants' costs ought not to be taxed at all, but he thinks that they ought to be taxed without regard to the scale of costs in the county court. The ground of his decision is contained in s. 1 (*b*) of the Public Authorities Protection Act, 1893, which says: "Wherever in any such action" (that is, an action against any person for any act done in pursuance of any public duty or authority or in respect of any alleged neglect or default in the execution of any such duty or authority) "a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client." It therefore carries costs which are to be taxed, and the County Courts Act, 1888, by s. 118, makes provision for the taxation of all costs as between solicitor and client: "All costs and charges between solicitor and client shall on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the Court in which such costs and charges were incurred." No doubt that section says that such costs shall be taxed on the application of the solicitor or client, "but not otherwise," but I think that if the corporation choose to say, "We will not apply to have our costs taxed as between solicitor and client," they will not be able to get any costs, because the only costs which the judgment in their favour carries are by the Public Authorities Protection Act, 1893, "costs to be taxed as between solicitor and client," and since the costs are to be taxed, I am of opinion that they must be taxed on the scale applicable in the county court as between solicitor and client. I think, therefore, that the learned county court judge came to a wrong conclusion, and that the appeal must be allowed.

BRAY J. I am of the same opinion, and for the same reasons. There is a scale of costs fixed by the County Courts Acts and Rules, by which costs as between solicitor and client may be taxed,

1906

TORY v. DORCHESTER CORPORATION.

Bray J.

and I think that these costs must be taxed according to that scale.

Any other construction of the words in the Public Authorities Protection Act would leave the plaintiff at the mercy of the corporation with regard to the costs which he has to pay, as it would be at their option whether they should apply or not to have these costs taxed as between solicitor and client. That would be an anomalous situation, and one which I do not think could be intended by the Public Authorities Protection Act.

The county court judge no doubt thought that s. 2 of the Public Authorities Protection Act repealed the provisions of the County Courts Act, 1888, in so far as they related to an action of this kind, but Mr. Pritchard has shrunk from supporting that contention, and I do not think that it can be entertained for a moment.

The result is that these costs must be taxed as between solicitor and client in accordance with the provisions of s. 118 of the County Courts Act, 1888.

Appeal allowed.

Solicitor for appellant: *John Trevor Davies.*

Solicitors for respondents: *Lovell, Son & Pitfield, for A. G. Symonds, Dorchester.*

A. P. P. K.

In re BUTTON.
Ex parte HAVISIDE.

1907
Jan. 14, 21.

Bankruptcy—Proof—Goods in Order and Disposition of Bankrupt—Reputed Ownership—Claim by true Owner to prove for Value of Goods—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 8; *s.* 44, *sub-s.* 2 (*iii.*).

Where goods have been adjudged to be the property of a bankrupt as having been in the order and disposition of the bankrupt with the consent and permission of the true owner of the goods, under such circumstances that the bankrupt was the reputed owner of them, the true owner cannot prove in the bankruptcy either for the value of the goods or for damages for the loss of them.

Semble, the reputed ownership clause in s. 44 of the Bankruptcy Act, 1883, is a penal enactment, and, when it applies, the true owner of the goods forfeits them.

This was an appeal from the decision of the trustee rejecting a proof against the debtor's estate under these circumstances :—

Prior to his bankruptcy the debtor carried on the business of a dealer in antiques and works of art, and the appellant Haviside was a collector of such goods. Haviside from time to time purchased goods of the debtor, for which he paid, and which he left in the custody of the debtor until he should require them. Haviside also purchased similar goods of other art dealers, for which he paid, and which he also placed with the debtor for safe custody. Ultimately Haviside gave up collecting, and instructed the debtor to sell the whole of his collection at the best prices he could obtain for them. The total value of the goods was about 758*l.*

On March 10, 1906, the debtor presented his own petition, and on the same day a receiving order was made against him, and on March 27 he was adjudicated bankrupt and a trustee was appointed. At the commencement of the bankruptcy, which was the date of the receiving order, all the goods of Haviside were still in the possession of the debtor; and on June 25 the Court, on the application of the trustee, held that all these goods passed to the trustee and formed part of the property of the bankrupt divisible amongst his creditors by virtue of s. 44, sub-s. 2 (iii.).

1907

BUTTON, *In re.* HAVISIDE, *Ex parte.*

In August Haviside lodged a proof against the bankrupt's estate for 758*l.*, which he claimed as the value of his goods entrusted by him to the debtor for sale on his behalf, and which goods had not been returned to him; alternatively, he claimed the 758*l.* as damages for the breach by the bankrupt of an implied contract that he would either sell the goods and account for the proceeds, or would return them. The trustee rejected the proof, on the grounds, amongst others—(1.) that the goods had been adjudged the property of the trustee by the order of June 25; (2.) that there had been no demand for the goods prior to the commencement of the bankruptcy; and (3.) that there was no breach by the bankrupt of any contract, express or implied. Against this rejection of his proof Haviside appealed. The goods had since been sold by the trustee.

H. Reed, *K.C.*, and *F. Mellor*, for Haviside. There was nothing wrong or unconscientious in Haviside leaving his goods in the possession of Button. It was a bailment of goods on the terms that Button should sell or return them. His petition was an act in contravention of the terms of that bailment by which he prevented himself from returning the goods, and Haviside lost them and was entitled at once to recover as damages the loss sustained by the breach of the terms of the bailment. When one person's goods are lawfully seized for the debt of another, the owner of the goods is entitled to be indemnified by the debtor: *Edmunds* v. *Wallingford*. (1) It is submitted that that principle applies here, and that Haviside is entitled to prove in the bankruptcy for the value of his goods, unless there is something in the bankrupt law to deprive him of his indemnity. There is no direct authority on the point, and nothing in modern text-books about it. But in Christian's Bankrupt Law, 2nd ed. (1818) vol. 1, p. 214, the learned author, dealing with the doctrine of reputed ownership, says: "An important question arises upon all these cases, where the assignees are entitled to sell the property for the benefit of the creditors in general, whether the real owner can be admitted as a creditor, and may prove the value of it, and be admitted to receive a dividend? This serious question has not yet been

(1) (1885) 14 Q. B. D. 811.

decided, and I have never seen it mentioned, or even alluded to, except by Lord Redesdale in the following words: 'And I here would observe, that the effect of this law is not a forfeiture of the property. In *Bryson* v. *Wylie* (1), Bryson was a creditor of the bankrupt for so much, and his taking that species of security did not avoid his demand for the debt. If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became a bankrupt, he would be a creditor for the amount of the money he paid for the purchaser,' *Joy* v. *Campbell* (2),'' and then proceeds to criticize adversely Lord Redesdale's dictum; but he adds, "I know it has been the practice to admit real owners as creditors, but it is a practice, like many other practices in the bankruptcy law, which cannot be reconciled with any sound principles of legal reasoning"; and in Montague and Ayrton's Bankrupt Law, 2nd ed. (1844) vol. 1, p. 290, it is stated, "If goods for which a vendee has paid are left in the order and disposition of the vendor, so as to be distributable by the Statute of James, the vendee may prove their value," citing *Joy* v. *Campbell* (2) and *Utterson* v. *Vernon*. (3) The doctrine of reputed ownership is the same to-day as in 1818, with this difference, that a debtor could not then, as now, initiate proceedings in bankruptcy against himself: that was first introduced by the Act of 1849. The argument on the other side must go to this, that in such cases the goods are *forfeited*, but Lord Redesdale says there is no forfeiture. It is believed that similar proofs have been admitted under the existing bankruptcy practice, but no direct evidence that this has happened can be adduced. Further, under s. 37 of the Bankruptcy Act, every kind of claim, present, future and contingent, is now provable, but such an extensive right of proof did not exist in 1818. Here the debtor was under an obligation to sell or return the goods, existing at the date of the bankruptcy, and that obligation was broken and his liability for that breach remains, and it is submitted that the owner of the goods can prove for damages to the value of the goods under sub-ss. 3 and 8 of s. 37.

(1) (1784) 1 Bos. & P. 83, n. (2) (1804) 1 Sch. & Lef. 328, 338.
(3) (1790) 3 T. R. 539, 548.

1907

BUTTON, *In re.* HAVISIDE, *Ex parte.*

Hansell, for the trustee. In the first place, there were no goods at the date of the commencement of the bankruptcy, which in this case was the date of the presentation of the petition, that were the property of Haviside in the possession of the debtor, because at that date they became and were the property of the trustee by virtue of s. 44 of the Act. Secondly, the debtor's obligation at that date was to sell the goods, and if not sold to return them on demand, but no demand was made before the bankruptcy. Therefore, any loss or damage Haviside has sustained does not arise out of any breach of contract by the bankrupt, but (*a*) by virtue of the provision of s. 44, and (*b*) by the true owner's own act or default in consenting to his goods being in the order and disposition of the bankrupt; consequently there is no debt or liability in respect of which a proof can be made. Lastly, there are two instances under the Act where property is taken away and a right of proof is expressly given. One is s. 55, which gives a right of proof for loss or damage sustained by the trustee's disclaimer. The other is s. 42, which gives a landlord a right of proof in certain circumstances. No right of proof is expressly given by s. 44, and it is submitted that the Legislature intended the reputed ownership clause in that section to be penal, and that, where a true owner has so acted that he has enabled a debtor to get false credit by the possession of his goods, he shall suffer the consequences and forfeit his property. The statements in the text-books cited are based on Lord Redesdale's dictum which was founded on *Bryson* v. *Wylie* (1), but that was a case of a secured creditor who lost his goods under the doctrine of reputed ownership, but could prove for the debt which remained under the covenant in the deed. That happens every day now in bill of sale cases, and the alleged practice is not admitted.

F. Mellor, in reply.

Cur. adv. vult.

Jan. 21. BIGHAM J. In this case I am asked to reverse the rejection by the trustee of a proof by Mr. Haviside for a sum

(1) 1 Bos. & P. 83, n.

of 758*l.* 16*s.* 6*d.* On March 10, 1906, the bankrupt presented his own petition, and he was duly adjudicated a bankrupt thereon. At that time he had in his possession as bailee certain goods of Mr. Haviside. These goods were subsequently declared by this Court to have been in the order and disposition of the bankrupt so as to form part of the bankrupt's property divisible amongst his creditors within the meaning of s. 44 of the Bankruptcy Act, 1883. It is now suggested that by presenting his own petition the bankrupt wrongfully terminated the contract of bailment and so gave to Mr. Haviside a right of proof for damages within the meaning of s. 37 of the Act. It is also further contended that to reject this proof would be to violate a well-known principle of law that, where one man's goods are lawfully taken to satisfy another man's debt, the owner of the goods shall have a remedy against the debtor for an indemnity. There is, in my opinion, nothing in either of these contentions. When a man's affairs become so involved that he cannot properly carry on his business, it becomes his duty to himself and to his creditors to present his petition to this Court. He commits no tort against anyone, nor does he break any contract, by discharging this duty. Certain statutory consequences no doubt follow on the act so done. One of these consequences is that his property passes to the trustee and becomes divisible amongst his creditors. The statute defines what this property shall comprise, and the definition includes (s. 44, sub-s. 2 (iii.)): "All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof." Therefore, when the trustee realizes such goods he is not dealing with the property of the original owner of the goods at all; he is dealing with the property which is already by law the property of the bankrupt divisible amongst his creditors. The original owner loses his goods not by any act of the bankrupt, but by operation of the statute. It is conceded that no authority can be found for the admission of such a proof as this. There is no debt, and there is no right to damages; nor is there any hardship in the case, for it is by reason of the original owner's consent

1907

BUTTON, *In re.* HAVISIDE, *Ex parte.*

and permission that his goods were placed in jeopardy and were then lost to him. The application must be dismissed with costs.

Solicitors: *Jackson, Smart, Geake & Co.; Piesse & Son.*

H. L. F.

C. A

1906

Dec. 10, 11.

[IN THE COURT OF APPEAL.]

JAMES JOICEY & CO., LIMITED AND THE EXECUTORS OF S. A. D. EDEN *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway Company—Mines—Compensation—Coal required to be left Unworked—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

The compensation payable by a railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, in respect of "such mines" as are required to be left unworked, is not profit, but indemnity for damages accrued to the owners (whether lessor or lessee the principle is the same) by reason of the embargo of the railway company which prevented the working of this particular part of the mine, and in calculating the value to the owner of his interest thus damaged, all the surrounding circumstances must be considered, including those that tend to diminish the injury that has accrued, damages being assessed on the basis that the owner is to get only what he would be entitled to under a fair bargain and nothing beyond.

Decision of Bigham J., [1906] 1 K. B. 195, reversed.

Smith v. *Great Western Ry. Co.*, (1877) 3 App. Cas. 165, distinguished.

APPEAL from Bigham J. (1)

The question for decision upon this appeal was the proper measure of compensation payable by a railway company in respect of minerals lying under their railway, when the company, in pursuance of s. 78 of the Railways Clauses Consolidation Act, 1845, requires the same to be left unworked.

The facts are fully stated in the report of the case in the Court below, and, as the material findings and contentions of the parties set out in the award are referred to in detail by Vaughan Williams L.J., the following summary is thought sufficient to make this report intelligible.

(1) [1906] 1 K. B. 195.

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

In 1886 James Joicey & Co., Limited, a colliery company, took a lease for twenty-one years of lands in the county of Durham and of the mines and minerals under the same; the executors of S. A. D. Eden were the reversioners. In 1887 the North Eastern Railway Company were authorized by a special Act incorporating the Railways Clauses Consolidation Act, 1845, to construct a railway over part of the lands included in this lease, and the railway was made accordingly. In 1892 the colliery company, being desirous of working the coal under the railway, gave notice to the railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, and were required by the railway company to leave unworked certain coal for which the railway company expressed their willingness to pay compensation. In the ordinary course the colliery company would have worked out this coal, but it would not have been possible for them in the time of their lease to have worked out all the coal lying under the whole of the land leased to them, and the effect of the requirement of the railway company was to cause the colliery to work other coal from another part of their land at an increased cost. The matter went to an arbitrator to settle the amount of compensation payable by the railway company.

If the coal had not been required to be left unworked, the colliery company would (as the arbitrator found) have made a profit out of such coal of 730*l.*, and the reversioners would have received in respect of it 155*l.* for royalties. The railway company contended that as it was impossible for the colliery company to have worked out all the coal within the term of their lease, they were only entitled by way of compensation to the extra expense incurred in working the other coal which was more expensive to get, and this amount was agreed at 100*l.*; and in this event the diminution in the value of the reversion to the lessors was agreed at 310*l.*

The arbitrator stated his award on these alternatives in the form of a special case for the opinion of the Court.

Bigham J. held that the proper measure of compensation to the colliery company and the reversioners was the profit which they would respectively have made on the coal which by the requirement of the railway company had been left unworked, and he directed the

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

railway company to pay to the colliery company 730*l.* and to the reversioners 155*l.*

The railway company appealed. The appeal was heard December 10 and 11, 1906.

Cripps, K.C., Upjohn, K.C., and *Ryde,* for the appellants. Compensation is payable to the lessee for damages done to him by reason of the embargo placed on this particular coal, and in calculating the amount of this compensation all the surrounding circumstances must be considered. A reduction in the amount payable to the lessee may involve the payment of a larger amount to the lessor, but the true principle is to ascertain the amount of money that will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation: *Livingstone* v. *Rawyards Coal Co.* (1) You have to see what the owner, whether lessor or lessee, has lost by reason of what has been done and compensate him accordingly. What is to be paid to the owner is not the price on a transaction of sale, but compensation for a continuing embargo on working: *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (2) In this case the reserved coal is part only of an existing mine, and the lessee is only entitled to compensation for the increased expense incurred in working the other coal in another part of the mine, an amount fixed by the award at 100*l.* A material fact in this case is that there was other coal which could be worked, and that in no event could the whole of the coal have been worked out during the term of this lease. It may be admitted that the lessor is entitled to compensation for the diminution in the value of the reversion, but where, as here, the lessor and lessee have different interests, the Court must take care that the railway company is not made to pay twice over for the same thing. Each owner must be compensated in respect of his separate and true interests and no more. The judgment of Bigham J. was wrong in treating this as a purchase of so much coal; it is compensation for damage done that the railway has to pay, and in this case it should be 100*l.* to the lessee and 310*l.* to the lessor.

(1) (1880) 5 App. Cas. 25, at p. 39. (2) [1903] A. C. 426, at p. 432.

C. A. Russell, K.C., and *W. D. Benson*, for the respondents. The fact that the lessor and the lessee are represented by the same counsel makes no difference to the principle on which this compensation is payable, and in our view of the case it is not necessary to argue separately the case of the lessor and of the lessee. Take the case of the lessee as the most difficult one; the question depends on the meaning of the words in s. 78, "compensation for such mines." Both the lessor and the lessee are to be compensated according to their interests in such mines: *Smith* v. *Great Western Ry. Co.* (1) You are not to consider what other mines the lessor or lessee may have, or in what way the lessee, if prevented from working a particular part of his colliery, can utilize his plant or his workmen; what has to be considered is, the interest of the lessee in the particular coal to which the embargo of the railway company applies, and then you compensate him for that. And on this point the award finds that the lessee would have realized a profit of 730*l.* had he been able to work out this particular coal, that is "such mines" as the railway company have prevented him from working. The measure of damages, therefore, is 730*l.*, the sum which the colliery company would have made out of this coal if it had not been required to stop working it by the railway company. This has nothing to do with compensation for lands injuriously affected; s. 81 provides a separate remedy for the lessee on this head, and this makes it clear that what alone has to be considered under s. 78 is the coal the lessee is prevented from working and what is his interest in that: and you cannot consider other coal outside this particular coal. The value of the lessee's interest cannot be ascertained by calculating the extra cost of working other coal.

[VAUGHAN WILLIAMS L.J. referred to *Barnsley Canal Co.* v. *Twibell.* (2)]

Smith v. *Great Western Ry. Co.* (1) shews clearly what the railway has to pay as compensation for the interest of the lessee, and the principle of that decision was followed in *Bullfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks* (3), though the particular point in that case was as to the admissibility

(1) 3 App. Cas. 165, at pp. 180, 181.

(2) (1844) 13 L. J. (Ch.) 434.

(3) [1903] A. C. 426, at p. 432.

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

of evidence of the market price. It is on the basis of the principles settled by these authorities that the sum of 730*l.* was arrived at.

The railway company's contention is that they are not to pay compensation for the reserved coal, but there is to be an inquiry what extra costs have been incurred in working other coal, and this extra cost is all that is to be paid for, with the result that they get this reserved coal for practically nothing. That cannot be right. The Court is bound by *Smith* v. *Great Western Ry. Co.* (1) The judgment appealed from is right. [*Holliday* v. *Mayor of Wakefield* (2) and *Midland Ry. Co.* v. *Robinson* (3) were also mentioned.]

Cripps, in reply. Compensation is to be paid for the interest of the particular lessee in this particular coal; if the lessee suffers no loss, then there is nothing to be paid, or merely nominal damages. Compensation is not profit, but indemnity. The Court cannot shut its eyes to relevant surrounding circumstances; they must be taken into account: *Bidder* v. *North Staffordshire Ry. Co.* (4)

VAUGHAN WILLIAMS L.J., after reading the judgment of Bigham J., continued: Now I gather from that judgment that what the learned judge thought the company had to pay for was the coal, and that, for the purpose of measuring the value, he treated the question as a case of a purchase of so much coal. In my opinion this is not a purchase of so much coal; this is a case which falls within the words of Lord Robertson in *The Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (5): "It follows that what is due to the appellants is not the price on a transaction of sale, but compensation for a continuing embargo on working," and consequently that the judgment in the Court below, so far as it goes, upon the basis that the appellants are entitled to be paid as if there had been a sale and purchase, is wrong. I think that compensation here means compensation for the damages which have accrued to the

(1) 3 App. Cas. 165, at pp. 180, 181.
(2) [1891] A. C. 81.
(3) (1889) 15 App. Cas. 19.
(4) (1878) 4 Q. B. D. 412.
(5) [1903] A. C. 426, at p. 432.

claimants by reason of the embargo preventing them from working this particular part of the mine in which the pillars of coal are reserved, and in that case it really does not make much difference, so far as the general principle is concerned, whether you are dealing with the case of an owner or with the case of a lessee with a limited interest. In each case you have to consider what is the value to the owner of his interest, and in assessing the damages you are to take into consideration all the surrounding circumstances; for example, to take into consideration as the Court did in *Livingstone* v. *Rawyards Coal Co.* (1) (where coal had been worked by mistake and without any wrong intent), the fact that the coal which was taken away from the plaintiff was coal to which he had no access, and coal lying in so small an area of land that it would not have paid anyone to go to the expense of making an access to it. And again, the principle on which damage is to be assessed is one in which you would take into consideration (whether you were dealing with the lessee or the owner) facts like these, that there were circumstances which made the fact of the owner being deprived of the user of a particular access to his property, or anything of that sort, of no importance whatever to his occupation of the rest of the premises which he happened to occupy. And so in the present case, we have to take into consideration, in compensating the lessee for the loss accruing to him for the effect upon his interest in this particular coal of the embargo on using it, all those facts which go to diminish the damages which accrue to him from that embargo, and I quite agree with the general proposition that when you are assessing these damages you ought to assess them upon the basis that the claimant would get what he would be entitled to under a fair bargain and not something beyond.

Now the particular point which has arisen in this case is one that has not arisen before. I think the previous authorities have decided generally that where there is an embargo against the claimant using part of his property, or where the railway company has got compulsorily under the statute the user of a particular pillar of coal, the proper measure of damage is the loss or damage sustained by this particular claimant by reason

(1) 5 App. Cas. 25.

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

Vaughan Williams L.J.

of the embargo upon his using this pillar of coal. That seems to me established. It seems to me also established that, in considering what is the loss to him, one must consider what his personal interest is, and how far his enjoyment of that interest is interfered with by the embargo. In this particular case it is said that in applying that principle to measure the loss to this particular owner, you should also take into consideration the fact that the lessee has access to the whole mine in which this pillar of coal stands, his interest is only for a term during which he could not work all the coal in the mine, and then you must consider whether he really has lost anything by being prevented from using this part of the mine. In order to answer this question, it is necessary to read the 9th and 11th paragraphs of the award. The 9th paragraph says: "If the reserved coal had not been required to be left unworked it would in the ordinary way and regular course of working have been worked by the coal company at various dates previous to December 31, 1903," so there would have been plenty of time to work this pillar, and in ordinary course this pillar of coal, this reserved coal, would have been worked out "and the coal company would have made out of the working of such coal a profit of 730*l.*, and the said Slingsby Arthur Duncombe Eden"—that is, the owner, the lessor—"would also have received as rent in respect thereof the sum of 155*l.*" Then the 11th says: "The average annual quantity of coal produced by the coal company out of the said seam continued unaltered until about the month of May, 1904, but since that month the output has been substantially diminished. A diminution of output would have occurred in the ordinary course, even if the reserved coal had not been required by the railway company to be left unworked, but the effect of the leaving unworked of the reserved coal has been to accelerate such diminution and also to accelerate the time when it became necessary for the coal company in the ordinary prosecution of their workings to work coal more expensive to get"—that is, more expensive to get than the reserved coal. "It is admitted that the effect of such acceleration has been to subject the coal company to increased expenses and loss, and for the purposes of

this case these are agreed at 100*l*. There is left unworked in the said Shield Row seam under the said lands a quantity of coal which the coal company will not in the ordinary course be able to exhaust within the term of the before-mentioned lease which expires January 1, 1907." Those being the facts, we come to the contentions which shew what either side says has to be taken into consideration in arriving at the sum which ought to be paid to the claimants respectively here. Paragraph 12 is: "Under these circumstances the railway company contend that the coal company have only suffered loss to the extent of 100*l*., and that this amount and no more is the compensation to which the coal company are entitled in respect of the reserved coal having been left by them in conformity with the requirements of the railway company." That is to say, their contention is that the coal company are not entitled to the 730*l*. mentioned in paragraph 9, that is, the profit that they would have made if you leave out of consideration altogether the facts mentioned in paragraph 11, and that they are only entitled to 100*l*., which is the increased expense which they would be put to for having to pass on to these other parts of the mine. In other words, it is said: You lost nothing; you, the coal company, here could not within the time of your lease have worked the whole of this coal, and in the facts which have occurred you really have had full use of your machinery; it is true that the coal upon which you have now worked is rather more expensive to get than the particular part of the coal which has been reserved, but compensation for that and for the increased expenses you may have. That is the 100*l*., but you may not have the 730*l*. The coal company express their contention in paragraph 13: "The coal company, on the other hand, contend that the proper measure of compensation which they are entitled to receive from the railway company is the amount of money which it is admitted that they would have made by the working of the reserved coal if such coal had not been required by the railway company to be left unworked, viz., the above-mentioned sum of 730*l*." On the facts which I have just been dealing with, the 730*l*. is not compensation for any loss that the coal company have really incurred: it is a sort of windfall or bonus which they think under the terms of the statute

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

Vaughan Williams L.J.

they are entitled to claim, the real truth being that they have not incurred, in the particular circumstances of this case, by having this large area to which they could apply their machinery, any loss whatsoever, except that loss which is covered by the 100*l.* mentioned in paragraph 11. I think that the view taken by the railway company, as expressed in paragraph 12, is the right view, and that, therefore, the judgment of Bigham J. is wrong.

I think that this is a case which is not covered by any previous authority, and I for some time had considerable hesitation in putting upon the words of s. 78 such a meaning as really entitled the railway company, as against the coal company, to get the user of the reserved pillar of coal for practically nothing, which, in the result, they do. But I do think that under these circumstances the answer to the coal company is this: Well, according to the true construction of s. 78, if you have incurred no damage and no loss by being excluded from the user of this pillar, whereas compensation is compensation for damage, you having incurred no damage are not entitled to be paid anything, and there is no injustice in the railway company getting the user of this pillar without paying you anything. I think, therefore, for the reasons that I have given, the judgment of Bigham J. ought to be reversed, and that we ought to give judgment upon the basis of the claim of the railway company as set forth in paragraph 12 of the special case.

FLETCHER MOULTON L.J. I have come to the same conclusion. This is one of the numerous cases which arise from the Legislature authorizing interference with private rights in order to render possible undertakings of public importance such as railways. They have permitted this interference in a large number of cases, but they have done so only on a principle which they have universally applied, namely, that where the railway company takes away a private right they shall give to the owner of that right its equivalent in money. Various types of interference appear in different statutes relating to different public works, the nature of the interference depending necessarily on the nature of the works. But, throughout, this general over-

riding idea of compensation—that is, of giving the pecuniary value of the specific right taken away—is always to be found. I do not think that it would be wrong to define such compensation as the statutory damages for a legalized wrong, and as in every other case of damages they have to be ascertained by estimating the injury which has been done to the individual by interfering with his private right. The amount has generally to be settled by arbitration in case of difference, but this is a mere question of machinery. If persons were quite impartial in their own matters, compensation would be that which a fair-minded and reasonable owner of a right would, under all the circumstances of the case, take for surrendering it; the sum being calculated on the principle that he was to be neither the better nor the worse for the legalized interference.

I now turn to s. 78 of the Railways Clauses Act, which is the section with which we have specially to deal to-day. I find there only a special case of interference with private rights, but I find no symptom of any intention on the part of the Legislature to depart from this broad overriding principle of compensation —that is to say, that the owner is to be no better and no worse for the interference. The function of s. 78 is to define what the nature of the interference is and not to introduce any new principle of compensation. The cases that have been decided on this part of the Railways Clauses Act have established that the interference is of the nature of an embargo put upon a certain portion of the coal so that it cannot be worked, and the question which we have to consider is, what is the pecuniary equivalent to the lessee and to the lessor of the interference with their rights by the embargo which the law has thus put upon the working of that coal. I need not deal with the case of the lessor (in my opinion, the more difficult case of the two), because practically that has not been argued before us. I will only deal with the case of the lessee. In this case the lessee had approached this particular coal, and was prepared to work it, and he, no doubt, could have worked it out within the time that his lease allowed. The embargo has turned him aside; he has had to work under less favourable circumstances, and the difference to him of having to work as he has in fact worked, and having to work as he would

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

Fletcher Moulton L.J.

have worked if he had been allowed to work the particular coal in question, is fixed, for the purposes of this case, at 100*l.* In other words, if he, having worked as he has worked, receives 100*l.*, he will be just as well off as if he had been allowed to work the embargoed coal. That, in my opinion, decides that the compensation which must be paid to him is this 100*l.* It will put him in as good a position as if he had not been interfered with, and no better, and this is just what compensation should do.

The argument of the respondents has been based on a finding in the special case which I think they have misunderstood. The special case finds that if the lessee had worked the coal on which the embargo is now placed his profit would have been 730*l.* That only means that if he had used his appliances and his organization for the requisite time upon working out that coal, and sold it, he would have realized a profit of 730*l.* It means no more. It does not mean that he would have given 730*l.* for the privilege, and it is that which has been taken away from him, of working that coal. On the contrary, it is evident from the special case that it would not have been worth his while to give more than 100*l.* for such privilege. It does not mean that any other person would have given 730*l.* for the privilege of working that coal. It would have been worthless to anybody else. So that in no sense is it the value of that coal. The real value of the privilege of working that coal to him is only the extra advantageousness of working that coal over working the coal to the working of which, in fact, he did devote his appliances and his organization. This is found by the case to be 100*l.* Under those circumstances I think that the sum of 730*l.* mentioned in the special case does not in anywise measure either the value to the lessee or to any one else of the privilege of working the coal or the loss which the taking away that right has occasioned to him. The true compensation is the 100*l.*, because it is the true measure of his loss, and I am therefore of opinion that this appeal should be allowed.

BUCKLEY L.J. I am of the same opinion. The first point is this, that there is not to be ascertained one sum which is to be divided between the lessee and the reversioner, but there are to be

ascertained two sums, the one in respect of the lessee's interest, and the other in respect of the reversioner's interest. Taking first the case of the lessee, his rights arise under s. 78 of the Railways Clauses Act, 1845, and if I call the coal to which the embargo extends coal A, and the other coal included in his lease coal B, the respondents have argued, and I agree with them in their contention, that what the lessee is entitled to is, in the words of the section, compensation "for such mines"; meaning compensation for coal A to which the embargo extends. Then also they agree to this, and it seems to me quite plain that the section means compensation for the lessee's interest in coal A. That is the thing which we have to ascertain. Now in doing that I have, to use Lord Blackburn's words in *Livingstone* v. *Rawyards Coal Co.* (1), as nearly as possible to get at that sum of money which will put the lessee in the same position as he would have been in if he had not sustained the wrong for which he is now getting this compensation. The next argument for the respondents, upon which I part company with them, is that, in ascertaining the lessee's interest in coal A, I ought to disregard the existence of coal B; that I am to shut my eyes to everything except the fact that there is coal A, which he could have got and would have got but for the embargo, and that the proper compensation payable to him is the loss which he sustained by not getting that coal, irrespective of the fact that he was able to get and did get other coal in its place. To my mind that argument is altogether in conflict with the judgment of this Court, delivered by Lord Bramwell in *Bidder* v. *The North Staffordshire Ry. Co.* (2) It is not a question of set-off. The question is to ascertain what is the interest of this particular lessee in this particular coal. I have to find what is the value of this coal to him. That was the decision in *Livingstone* v. *Rawyards Coal Co.* (1) I have to find what the lessee has lost by being precluded from getting this coal, and the compensation is to be not profit, but indemnity.

Now the facts are, that included in his lease was an amount of coal in excess of that which he could have got during the rest of his term, which will expire on January 1, 1907, and the

(1) 5 App. Cas. 25. (2) 4 Q. B. D. 412.

C. A. 1906

JAMES JOICEY & CO., LIMITED AND EXECUTORS OF S. A. D. EDEN v. NORTH EASTERN RAILWAY.

Buckley L.J.

result of what was done was that he was precluded from getting coal A, but was in a position to apply his machinery and plant to get, and he did get, coal B. The true measure of the compensation, I think, is to ascertain, taking all the circumstances of the case into consideration (and the most cardinal one here is that he had other coal in his lease which he could get and did get), what loss did he sustain by being precluded from getting coal A, having regard, amongst other things, to the fact that he could get coal B? The true measure of the injury to him is the additional cost and expense to which he was put by being driven to take other coal instead of this coal. If the respondent's contention is right, he would be entitled, not to indemnity, but to profit, by reason of that which the railway company have done. The argument for the respondent is, that he has lost the 730*l.* profit which it is agreed he would have made in working this coal, and you are to shut your eyes to the fact that he made other profit by taking other coal, and they say that is a set-off. It seems to me, from the judgment in *Bidder* v. *The North Staffordshire Ry. Co.* (1), it is not so at all.

The argument has been pressed upon us that the language of Lord Cairns in *Smith* v. *The Great Western Ry. Co.* (2), at the foot of p. 179 and the top of p. 180, is in favour of the respondent's argument. To my mind it is not. The facts in that case were that the lessee was in a position to get, but for the embargo, and under his lease was under covenant to get, all the coal included in the demise to him, within the period of his term. It was not a case, therefore, in which he had an alternative of going elsewhere to get coal in place of that which was the subject of the embargo. Directly you add that particular fact, to my mind the problem assumes a totally different aspect. I arrive at the conclusion that what we have to find is what was the value of this coal to this lessee, and that this lessee was a person who was in a position to get other coal, instead of this coal, at an enhanced price, and, consequently, the measure of the injury to him is the enhanced price which he had to pay in order to get that coal. The result, therefore, is that as regards

(1) 4 Q. B. D. 412. (2) 3 App. Cas. 165.

the lessee I think the contention of the railway company in paragraph 12 is the right one, and that he is entitled only to the 100*l.* damages.

Then, as regards the lessor, the matter has been much less strenuously argued. It appears to me that that is reasonably plain. The lessor's interest was to receive royalties over a term of years ending in January, 1907, and after that to have possession and occupation of the property. What he lost was this. To the extent to which his royalties were affected during the term he was a loser, and to the extent to which at the expiration of the term he was precluded from getting coal A, which was the subject of the embargo, he was a loser. How are those measured? They are measured, it appears to me, by the diminution in the value of his reversion up to the date of the service of the notice. That will measure the loss which he sustained by the reduction of royalties and the loss which he sustained by the property, when it falls to him at the expiration of the term, containing a certain amount of coal which he cannot get. I think, therefore, with regard to the lessor, the contention in paragraph 14 is right, and consequently the award ought to stand at 100*l.* to the lessee and 310*l.* to the lessor.

Appeal allowed.

Solicitors: *R. F. Dunnell, York; Rawle & Johnstone, for Cooper & Goodger, Newcastle-upon-Tyne.*

W. C. D.

C A.
1906
Dec. 17, 18.

[IN THE COURT OF APPEAL.]

YOUNG *v.* JOINT BURIALS COMMITTEE FOR THE PARISHES OF KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE.

Burial Ground—Fees to Incumbent—Erection of Monuments—Consecration—"Payable"—"Used"—Burial Act, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4 (*i*).

In 1893 a burial board acquired eight acres of land adjoining, but separated by a wall from, seventeen acres then being used as a burial ground, with the intention of using this additional land for burial purposes. In 1897 communication was made between the two areas, and the eight acres were laid out as a burial ground. In June, 1900, the Home Secretary sanctioned a division into consecrated and unconsecrated portions. On July 2 the petition for consecration was sent to the bishop. On July 10 the Burial Act, 1900, received the Royal Assent. On October 13 part of the eight acres was consecrated. In November, 1902, the first burial in the consecrated portion took place. The incumbent of a parish, who was entitled to receive fees other than for services rendered in respect of the seventeen acres, claimed, under s. 3, sub-s. 4 (*i*), of the Burial Act, 1900, similar fees in respect of the eight acres:—

Held, that as the incumbent's right to fees arose only in respect of the consecrated portion of the burial ground, and that as the actual consecration did not take place until after the passing of the Act, this claim to fees could not be allowed.

Decision of Channell J., [1906] 1 K. B. 338, affirmed, but on different grounds. Meaning of the words "payable," "used" for the purposes of a parish, and "used" before the passing of the Act, discussed.

Appeal from Channell J. (1)

The question for decision raised by this appeal was whether, under the somewhat exceptional circumstances of this case, a certain eight acres recently added to an existing burial ground was, on the true construction of s. 3, sub-s. 4 (*i*), of the Burial Act, 1900, ground in respect of which fees other than for services rendered were payable to the incumbent at the passing of that Act.

With the exception of the date of the petition to the bishop for consecration, which in the view taken by the Court was material, the facts are fully stated in the report of the case in the Court

(1) [1906] 1 K. B. 338.

below, and the following summary is considered sufficient to make the arguments and judgments intelligible.

In 1893, a burial board acquired eight acres of land adjoining, but separated by a wall from, seventeen acres then being used as a burial ground, with the intention of eventually using the eight acres for burial purposes.

In 1897 communication was made between the two areas, the wall next the seventeen acres was lowered to one foot above the ground, and the eight acres were laid out and adapted for burial purposes so that this additional area might be used when required.

On June 13, 1900, the Home Secretary sanctioned a division of the eight acres into consecrated and unconsecrated portions. On July 2 the petition for consecration was sent to the bishop. On July 10 the Burial Act, 1900, received the Royal Assent. On October 13 part of the eight acres was consecrated. In November, 1902, the first burial in the consecrated portion took place.

The incumbent of a parish who was entitled to receive fees in respect of the erection of monuments on the seventeen acres claimed, under s. 3, sub-s. 4 (*i*), of the Burial Act, 1900, similar fees in respect of the eight acres.

Channell J. held that, though the eight acres formed part of the previously existing burial ground, the incumbent was not entitled to the fees claimed, because the eight acres had not been used as a burial ground before the passing of the Act.

The incumbent appealed.

The appeal was heard on December 17 and 18.

Acland, K.C., and *A. B. Kempe*, for the appellant. Sect. 25 of the Burial Act, 1852, made applicable to the rest of England and Wales by the Burial Act, 1853, imposes upon burial boards the duty of providing burial grounds, and under the provisions of that Act the seventeen acres were acquired and laid out. Sects. 32 and 33 provide for fees to the incumbent out of the consecrated portion. When additional accommodation was required the burial board might have provided a separate and distinct burial ground under the Burial Act, 1857, s. 3, or under

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

s. 26 of the Act of 1852 they could acquire land for making an addition to the existing ground. What was done was to acquire these eight acres as an addition to the existing ground, with the result that there was one burial ground of twenty-five acres, not two separate burial grounds—one burial ground, therefore, which was "laid out and used" within s. 3, sub-s. 4 (*i*), of the Burial Act, 1900, before the passing of that Act; and consequently the appellant is entitled to the same fees in respect of the eight acres as he was in respect of the seventeen acres. The burial board by all their acts have treated these two pieces of ground as one burial ground; in the present case, too, there is an actual physical continuity. Channell J. found as a fact that these eight acres formed part of an existing burial ground in respect of which fees were payable, but then he goes on to draw conclusions which are not justified, and on this point the judgment is wrong.

Eldon Bankes, *K.C.*, and *Lewis Thomas*, for the respondents. The object of s. 3, sub-s. 4 (*i*), was merely to preserve rights that existed at the date of the passing of the Burial Act, 1900. The appellant is endeavouring to turn this saving clause into an enacting clause, and to get under it something to which he was not entitled at the passing of the Burial Act, 1900. Lindley M.R. in *Ward* v. *Portsmouth Corporation* (1) sets out very clearly the steps made necessary by the Burial Act, 1852, for providing a new burial ground for a parish, and he states that under s. 32 the land does not become the burial ground of the parish until the bishop has consecrated it. It is only in respect of the consecrated portion that fees are payable to the incumbent. In the present case, though the Home Secretary had approved of the proposed division into the consecrated and unconsecrated portions, the former was not consecrated till October 13, after the passing of the Act. Therefore, at the passing of the Act, the eight acres was not a "burial ground attached to or used for the purposes of the parish." Nothing more had been done beyond laying it out, and the appellant therefore had no existing right to fees, and is not within the proviso saving existing rights. The fact that the new piece of ground is physically connected with an existing burial ground is not enough: they are, in fact, separate

(1) [1898] 2 Ch. 191, at pp. 198, 199.

burial grounds; the eight acres only became capable of earning fees after it had been consecrated. No portion of it had been "used" for burials till 1902. The Burial Act, 1855, s. 9, refers to land "already used," and "used" in this sub-section of the Burial Act, 1900, means "used for interments." The beginning of the proviso says where fees "are payable"; none were payable in respect of these eight acres.

[BUCKLEY L.J. The words "are payable" cannot mean literally "are payable immediately"; they must mean "would be payable in the event of a burial."]

Even then no fees would be payable in respect of these eight acres at the passing of the Act of 1900.

Acland, K.C., in reply. Everything was ready for consecration; the approval of the Home Secretary and of the bishop had been obtained before the passing of the Act. It was a mere accident that the actual service of consecration did not also take place before the Act passed. There was no uncertainty about its immediate consecration; upon consecration followed by an interment fees "would be payable." The rights of the incumbent ought not to be made to depend on any trifling delay by the bishop in consecrating the portions set aside as ground to be consecrated. The Burial Act, 1857, ss. 12 and 13, makes provision for the case where the bishop does not proceed promptly. Consecration, even if after the Act of 1900, would not deprive an incumbent of his rights, if the condition of the ground were such, from all other formalities having been complied with, that persons could lawfully be buried therein.

VAUGHAN WILLIAMS L.J. This case has taken some time to argue, but the difficulty of the question raised was worthy of the time which the argument has occupied. In applying an Act of Parliament to a particular state of circumstances, if the words of the Act seem to compel one to arrive at a result which it is hardly possible that the Legislature should have contemplated, a judge is not only justified in making a lengthy investigation to see if he can avoid such a conclusion, but would fail in his duty if he did not do so.

[After reading s. 3, sub-s. 4 (*i*), and shortly stating the sequence

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

Vaughan Williams L.J.

of events down to the laying out of the eight acres, the Lord Justice continued :—] On July 2, before the passing of the Act, a petition was presented to obtain consecretion of that part of this cemetery which was to be devoted to burials according to the rites of the Church of England. It was necessary, in addition to the presentation of the petition to the bishop, to obtain the sanction of the Home Secretary as to the division of the ground into consecrated and unconsecrated portions, and the form in which that was done was on June 13, when the Home Secretary wrote: "I hereby signify my approval of the redivision of the Kingston-upon-Thames cemetery into consecrated and unconsecrated portions as shewn on this plan." The sanction of the Home Secretary and of the bishop having been obtained in this way immediately before the passing of the Act, the actual consecration takes place at a later date.

The only question we have to decide in this case is, at the moment when the Burial Act, 1900, was passed, had this land, which had been added to the seventeen acres for the purposes of enlarging the burying ground, become ground in respect of which, "at the passing of this Act," the incumbent could claim fees? Was it at that moment ground earning fees? Everyone is agreed, as Buckley L.J. pointed out, that the words "are payable" cannot mean literally "are payable immediately," because no fee is really payable unless and until there is an actual interment; and I do not think that the Act of Parliament meant at all to say, when it used these words, "Where at the passing of this Act fees other than for services rendered are payable," that it was a condition precedent that there should be an interment, and that that was a condition precedent which must have existed at the time of the passing of the Act. But if one reads it as meaning "Would be payable if and when the contingency of a death and burial followed," that, I think, is putting the meaning on this Act that the Legislature intended.

Then it is said further, "May you not treat consecration in the same way? May you not say that what the Act of Parliament meant was that these fees should be payable to the incumbent if, at the time of the passing of the Act, things were in such

a state that when the consecration took place and an interment followed fees 'would be payable'?" There is a good deal to be said in favour of that contention, but very reluctantly I have come to the conclusion that you cannot so treat the contingency of consecration, even though in the sequence of events, as here, there was no uncertainty at all about the immediate consecration of the land by the bishop.

Under these circumstances I think we must affirm the judgment of Channell J., although I have already said I think the Legislature really meant, where the burial board had established a burial ground, and where the ground was ready for interments, and where the bishop was giving a favourable answer to the petition for consecration, and where the Home Secretary had already divided the land into consecrated and unconsecrated portions, that the title of the incumbent to the fees (which, after all, are only a substitution for fees that he was entitled to before the passing of the Burial Acts as the owner of the freehold of the churchyard) should not be omitted in a statute which was obviously intended to preserve under certain conditions those rights, and not to operate so as to deprive the incumbent of those fees merely because of the accident of the date on which the service of consecration was actually performed.

FLETCHER MOULTON L.J. I agree with the opinion that the judgment of the learned judge was right and should be affirmed. I have much less difficulty in coming to this conclusion than the president of the Court obviously has; and that may be explained, no doubt, by the fact that it does not seem to me to be a case of hardship in any way, and, therefore, I have not felt any temptation to try to get the case out of what in my eyes is the plain language of the Act.

This case turns on the meaning of s. 3, sub-s. 4 (*i*), of the Burial Act, 1900. But to understand the meaning of that section and of its proviso, one must look at the course of legislation with regard to burial grounds in England. Originally the burial ground was the churchyard, which was the freehold of the incumbent; and there, in addition to fees for his services in conducting the funeral service, the incumbent was entitled to

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

Fletcher Moulton L.J.

charge fees with respect to exclusive right of burial, the erection of monuments, and various other things.

In the year 1852 an Act was passed applying only to the metropolis, but which was in the year 1853 extended to other parts of England, dealing with the question of providing additional burial grounds. It provided that burial boards might be formed in parishes—either a single burial board for a single parish, or a joint burial board for more than one parish—and that these boards might acquire land for the purpose of burial grounds, and, subject to certain conditions and formalities, might in this way provide burial grounds for parishes which would take the place of the churchyards for the purpose of interments. These boards were given the power of holding such land; and by s. 28 they might sell any land so held that they thought should be sold, provided that no interment had taken place in it. So soon as an interment had taken place, the land became irrevocably dedicated to the purposes of a burial ground, and no such sale could take place. The Act also provided that part of the land should be consecrated, and that part should remain unconsecrated for the use of those sects that wished their dead to be buried in ground not consecrated by the bishops of the Established Church.

The next question was, How should the incumbents be treated? The incumbents had up to that time enjoyed a right to fees for other things than services, by reason of the graveyard being their freehold. But the land thus acquired and held by burial boards was not in any sense the freehold of the incumbent, nor had he contributed towards its purchase anything more than any other member of the parish in a similar position in life. But it was felt that it might be a hardship on incumbents if they lost what they otherwise would in many cases have got, viz., these fees in connection with burials in graveyards. To avoid inflicting this hardship upon them, and probably in order to prevent their having an interest in the burials taking place in the graveyards rather than in the new cemeteries, it was provided that with regard to burials in the consecrated part of a burial ground provided by a burial board the incumbent should have like privileges with regard to fees "other than for services

rendered" to those which he had with regard to burials in his own freehold, the churchyard. The consequence was that, for all practical purposes, an incumbent was put with regard to the consecrated part of this land, bought with public money, in the same position as if he owned the freehold of it in the same way that he owned the freehold of the churchyard.

This state of things went on until the year 1900, and then a change of policy took place. It is embodied in s. 3 of that Act. For the future, burying grounds provided by burial boards are not to be subject to the condition that I have described. The consecrated part is no longer to be treated as though it were the freehold of the incumbent. But there is a reservation for rights already acquired, and this case turns entirely on the construction of that reservation. The words are: "Provided as follows: Where, at the passing of this Act"—that is to say, under the legislation then existing—"fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish." Let me pause there. Certain burying grounds could not be said to be "attached to" a particular parish, because they were the burial grounds of more than one parish, and it seems to me that the words "attached to" refer to a burial ground that is the burial ground of one special parish, and the words "or used for the purposes of a parish" refer to cases where a parish is only one of two or more users of a burial ground. It continues thus: "And laid out and used before the passing of this Act." What do these words mean? It seems to me that the Legislature says plainly enough, "We do not intend this reservation of existing rights to apply to a case where the burial board has only acquired the land, or has only acquired the land and done the necessary acts to enable it to be used as a burial ground—that is to say, has laid it out as a burial ground. We are going to reserve the rights only in the case where the burial ground has been laid out and *actually used*. The rights of the incumbent shall be reserved with regard to those burial grounds which are at the moment of the passing of the Act in actual use as burial grounds; but otherwise they shall not. In other words, no new right shall arise."

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

Fletcher Moulton L.J.

I have no doubt that the word "used" was, broadly speaking, intended to be equivalent to "used for the purpose of interment. But it is not necessary for us on this occasion to decide, and I do not decide, whether anything short of "used for interment" would do. It appears to me that, if the ground had been laid out for a burial ground, notice that burials might take place in it had been put up, and parcels had been sold for the purpose of graves, a strong argument might be made in favour of the contention that this was a user, even though no interment had actually taken place. But fortunately this case is not near that border line, so I will not deal with it. Broadly speaking, the reservation was in favour of those burial grounds only which were in actual use at the date of the passing of the Act. Now, that being my interpretation of the reservation of existing rights, let me examine the facts of the case before us.

In this case the seventeen acres were constituted a burial ground, and there is no question that the incumbent's rights with regard to it were reserved. What was the position with regard to the eight acres? The eight acres had certainly been bought by the burial board, and had certainly been laid out by the burial board; but I can find no evidence whatever to the effect that anything more had been done than laying them out. I cannot find that the plot had in any sense been "used." And I think I can go further than that. When one looks at the facts of the case, one sees that for the purposes of the consecrated part (which is the only part over which an incumbent could get any such rights as those which are reserved by the proviso) it was not fit to be used; it was not yet consecrated. It was open to the burial board, in my opinion, to change its mind as to the mode of division into consecrated and unconsecrated portions, and to apply to one of His Majesty's Secretaries of State for an approval of the new mode of division. Moreover, it was open to them to decide that they would not go on with their plan of making this land into a cemetery. If they found the soil was unsuitable, it was open to them to sell the land, inasmuch as no interment had as yet taken place in it. So that in no sense of the word was this land "used," nor was it, so far as the rights of the incumbent were concerned, in a fit state to be used.

Therefore, in my opinion, his rights with regard to it were not preserved. In fact he had no such rights. There were with regard to it at the passing of the Act no "fees other than for services rendered" which were "payable in respect of any matter arising in it." If there had been a vault, and if there had been a tombstone erected over it, he would, as matters stood at the passing of the Act, have had no rights with regard to them. I am therefore of opinion that the judgment of the learned judge below was right.

And now I will touch on the only point which, in my opinion, gives any plausibility to the case of the plaintiff, and which doubtless has led to this case being fought. It is this—that there is a long stretch of boundary common to the new plot of land and to the old burying ground. The one lies by the side of the other. It is true that the line of demarcation is clearly marked, but the two plots are contiguous along the whole of one side of the plot of eight acres. Now, does that make any difference? I can see no ground for thinking that it does. As far as I am concerned, the case is exactly the same as though this plot were on the other side of the road, or two or three yards off, or a quarter of a mile off. I cannot see that contiguity or conterminousness has anything whatever to do with the effect of this proviso. I think we have to treat it exactly in the same way as though this were an isolated plot of land belonging to the burial board, which they had intended soon to use as a burying ground; which they had laid out; as to which they had proposed an arrangement sanctioned by the Secretary of State as to division between the consecrated and unconsecrated portions; as to which they had even gone so far as to present a petition that consecration might take place. But that was all that had been done. There had been no consecration; there had been no use; indeed, there was no use for two years afterwards. It is not necessary to decide the point, but speaking for myself, I do not think that mere consecration would have been a user within the meaning of this proviso. Nor do I think that there is any hardship in this view. When you are going to reserve rights of this kind from a certain date, it is necessary that you should draw a hard and fast line, and the Legislature has drawn the line at actual user.

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

This case seems to me to be well beyond the line, because no user actually took place until more than two years after the date of the passing of the Act of 1900.

I am of opinion, therefore, that it is within both the letter and the spirit of s. 3, sub-s. 4, and is outside the reservation in the proviso (*i*).

BUCKLEY L.J. It is with the greatest reluctance that I find myself driven to the conclusion that this appeal must be dismissed. The question is one arising upon the true construction of s. 3, sub-s. 4, of the Burials Act, 1900. At the date of the passing of that Act an incumbent was, under the Act of 1852, entitled to certain fees in respect of acts done in the consecrated part of burial grounds provided by burial boards. The operation of s. 3, sub-s. 4, of the Act of 1900, was to deprive him of all right to those fees subject to an exception. The exception is contained in the proviso. The whole question here is whether this incumbent is, in respect of this eight acres, within the proviso.

For the purpose of construing that proviso, I have to fix my attention upon the date of the passing of this Act—July 10, 1900—and to say whether this eight acres at that date—July 10, 1900—satisfied certain conditions. The language is, reading it shortly: "Where, at the passing of this Act fees are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish." I pause there. As the first qualification I have to say whether this eight acres was, on July 10, 1900, a burial ground "attached to or used for the purposes of a parish."

I find that by s. 25 of the Act of 1852 a burial board could provide a burial ground for a parish or parishes. It need not be "attached" to one parish; it could be "attached to or used for the purposes of" several parishes. The word "used" in that connection does not, to my mind, mean "used for the purposes of interment." It means used in a sense similar to that in which the previous word "attached" is employed. That is to say, a burial ground must be one attached to a parish, that is, appropriated to the parish, or one used for the purposes

of the parish, or in conjunction with other parishes. The word "used" there means, I think, devoted to the purposes of a burial ground by attachment to the parish or user for the parish.

The facts with regard to this particular eight acres were these. [Having stated them, the Lord Justice continued:—] These acts to my mind effected this—they threw the eight acres into the seventeen acres, and made it one ground. In 1897, if not at an earlier date, the whole twenty-five acres had become "attached to or used for the purposes of" this parish as a burial ground. It was but one burial ground. The seventeen acres had of course been used for interments. If I am right, therefore, it follows that even if the section means "used for interment" the whole twenty-five acres had been "used" in 1897. But assuming that is not so, I go on to consider the next words that have to be satisfied, and they are these. It must be "laid out and used before the passing of this Act."

The word "used" there, to my mind, means the same thing, or a similar thing, to the word "used" in the line before. It does not, I think, mean "used for the purposes of interment," but means laid out and used in the sense of "laid out and appropriated to the purposes of burial." I do not suppose it would be denied that, if they had built a chapel upon it, that would be a user, although they had never laid a corpse in it. Many other acts would be user. I think the acts they have done here, by throwing one ground into the other, making it all one burial ground, constituted a user before the passing of the Act.

Then the next question is this. I have to find whether, at the passing of this Act, fees "are payable in respect of any other matter arising in" this burial ground. It is quite plain that in that sentence the words "fees are payable" are not to be strictly and literally read. Fees only become payable when an interment is made; nobody disputes that, if this is a burial ground, the fees which may be recovered are not confined to fees in respect of an interment which takes place before July 10, 1900, but include fees in respect of an interment which takes place at any time within the period limited by the Act, namely, the incumbency of the parson or fifteen years, whichever is the longer, notwithstanding that the interment takes place after the

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

Buckley L.J.

passing of the Act. The words "are payable" mean "would be payable in the event of an interment being made."

Then since the fees in question are fees payable in an event—namely, the event of an interment—may there not be included fees payable in the event of consecration followed by interment. Here arises a difficulty which I find myself unable to surmount. By s. 32 of the Act of 1852, "from and after the consecration" of the burial ground, the burial ground was to be deemed the burial ground of the parish. So that s. 32, for some purposes at any rate—and I rather think for all purposes—makes it the burial ground of the parish only from the moment of consecration, so far as the consecrated part is concerned.

But the greatest difficulty arises from s. 33, because under s. 33, which is the one that gives the incumbent the right to his fees, he gets the right only to fees or payments to be made in respect of any rights acquired under this enactment "in the consecrated part of such burial ground." The Act of 1900 swept away this right to fees altogether, subject to the proviso; and repealed this part of s. 33 which gives the incumbent his right to his fees. It seems to me impossible to resist the conclusion that it swept away the one because it was giving the other; the one goes and the other comes. How, then, at the date of the passing of the Act on July 10, 1900, can the ground here in question have been ground capable of earning fees, when it was at that date unconsecrated ground.

Mr. Acland, in his reply, called our attention to certain sections of the Act of 1857 (ss. 12 and 13), which contain provisions applicable to the case when the bishop does not proceed promptly to the consecration of the ground. The one gives an appeal to the Archbishop, and the Archbishop may license the ground for the interment of bodies, "and the licence shall until the ground is consecrated operate to make lawful the use of the same as if it had been consecrated." The other (s. 13) provides that if the Secretary of State certifies that the necessary provisions have been complied with, the incumbent may bury in the burial ground "prior to the decision of the bishop or Archbishop upon the application for the consecration thereof." It is enough to say that no steps were

taken under these sections. It is not that the bishop had refused to consecrate. If that had taken place I might have seen my way to get over the difficulty. What did happen was this—and here comes the point which it seems to me is a very great hardship on the incumbent here—on June 13, 1900, the Secretary of State signified his approval of "the re-division of the Kingston-upon-Thames cemetery into consecrated and unconsecrated portions as shewn on this plan." That was a formal act done by the Secretary of State, treating this burial ground as one burial ground. It was all one, and he was approving a division of that one burial ground into consecrated and unconsecrated portions as shewn upon the plan. There is not the least doubt what the burial board meant at that date. They were going to obtain consecration of a further portion consequent upon that act of the Home Secretary. It does not stop there. On July 2, 1900, the burial board presented their petition to the bishop asking him to consecrate the ground. In that state of facts, on July 10 the Royal Assent was given to the Bill and it became an Act of Parliament. At the date of the passing of the Act, therefore, every formal act was done with a view to obtaining the consecration of this ground. The lamentable thing is that the actual consecration did not ensue until the month of October, after the Act had passed. In that state of facts, hard as it is upon the appellant, I cannot see my way to say that on July 10, 1900, this was land which by consecration had been brought within s. 33 of the Act of 1852 so as to entitle the incumbent to fees when interments should take place in that ground. That being so it seems to me that this appeal must be dismissed.

I have reserved until the last the observations I have to make on the judgment of Channell J., for whose judgment I need hardly say I have the very highest respect. I agree in his conclusion, but with all respect I cannot follow him in his reasons. The reasons which the learned judge gave were shortly these. They will be found on p. 345. He says: "I think for the purposes of this section the eight acres must be treated as a separate burial ground from the seventeen acres. Otherwise any future addition within the fifteen years to a previously existing burial ground

C. A. 1906

YOUNG v. KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE.

Buckley L.J.

would increase the area in respect of which the incumbent is to have his local fee." I dissent from that. It appears to me that if, during the fifteen years, land is subsequently acquired and added to the ground, there is no room under the Act of Parliament to say that it satisfies the conditions which I have shewn to be, in my judgment, necessary in order to entitle the incumbent to fees. I do not agree that this was treated as a separate burial ground; I think it all one burial ground; and the reason that the learned judge gives for saying that it must be so is, I think, based upon a mistake as to the provisions of the Act of Parliament. It is simply on the ground that the eight acres was not consecrated on July 10, 1900, that I think that the appeal must be dismissed. In arriving at that conclusion, I think the case so hard upon the incumbent, that I hope to hear the respondents say that they do not ask for costs.

Appeal dismissed.

Solicitors: *Day & Son; Durham, Carter & Durham.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.
1907
Jan. 16, 17.

WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS.

River—Pollution—Summary Proceedings by Sanitary Authority—Consent of Local Government Board—Notice of Intention to take Proceedings—Validity of Notice—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 6, 13.

The Rivers Pollution Prevention Act, 1876, authorizes a sanitary authority to take proceedings in respect of certain offences under the Act, but provides that such proceedings shall not be taken without the consent of the Local Government Board, nor until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender :—

Held, that the notice could not be given until the consent of the Local Government Board had been obtained.

West Riding of Yorkshire Rivers Board v. *Scarr End Mill Co.*, (1901) 65 J. P. 776, overruled.

Midlothian County Council v. *Oakbank Oil Co., Ld.*, (1903) 5 F. 700, followed.

Appeal from a decision of the Divisional Court (Lord Alverstone C.J. and Wills and Darling JJ.), affirming the decision of the judge of the Huddersfield County Court.

The question raised by this appeal was whether a sanitary authority proposing to take proceedings in respect of an offence under Part III. of the Rivers Pollution Prevention Act, 1876, must obtain the consent required by s. 6 to be given by the Local Government Board to such proceedings before giving the two months' notice of intention to take proceedings prescribed by s. 13, or whether they might give the notice first and obtain the consent afterwards.

On August 6, 1904, the plaintiffs, being a sanitary authority, served on the defendants a notice of intention to take proceedings against them for polluting the river Colne contrary to the provisions of s. 4 in Part III. of the Act.

On October 18, 1904, an inquiry was held by the Local Government Board, and on December 5, 1904, their consent to the proceedings was given.

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

On March 20, 1905, the plaint was entered in the county court.

On May 17, 1905, the defendants gave notice that they intended to rely on the statutory defence that notice of the plaintiffs' intention to take proceedings was not duly given as required by the statute. (1)

(1) The material provisions of the Rivers Pollution Prevention Act, 1876, are as follows:—

Sect. 4: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . . ."

Sect. 6: "Unless and until Parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this part of this Act save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board: . . . .

"The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality.

"The said Board shall not give their consent to proceedings by the sanitary authority of any district, which is the seat of any manufacturing industry, unless they are satisfied after due inquiry that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

"Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; . . . ."

Sect. 13: "Proceedings shall not be taken under this Act against any person for any offence against the provisions of Parts II. and III. of this Act until the expiration of twelve months after the passing of this Act; nor shall proceedings in any case be taken under this Act for any offence against this Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender. . . . ."

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

On June 1, 1905, the county court judge made an order against the defendants requiring them to abstain from causing or permitting the fall or flow into the river Colne of any polluting liquids from their factory. The defendants appealed against this decision to the Divisional Court. The Divisional Court, following the decision of the King's Bench Division in *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.* (1) in preference to the decision of the Scottish Court in *Midlothian County Council* v. *Oakbank Oil Co., Ld.* (2), affirmed the decision of the county court judge.

The defendants appealed.

C. F. Lowenthal (*Macmorran, K.C.*, with him), for the defendants. Part III., s. 4, of the Rivers Pollution Prevention Act, 1876, makes it an offence for a manufacturer to discharge noxious liquids into any stream, but the Act imposes various restrictions upon the right of proceeding against the manufacturer. Thus, by s. 6 proceedings can only be taken by a sanitary authority, and no proceedings can be taken without the consent of the Local Government Board, and the Board, in giving or withholding their consent, are to have regard to the industrial interests involved, and are not to give their consent unless they are of opinion that no material injury will be inflicted on those interests. Then, notwithstanding that consent, the manufacturer is to be at liberty to shew cause before the sanitary authority why proceedings should not be taken against him, and the sanitary authority, in determining the question, are to have regard to all the considerations to which the Local Government Board are directed to have regard. By s. 8 the sanitary authority are empowered to institute proceedings subject to the restrictions in the Act contained. Then, by s. 13 no proceedings are to be taken until after the expiration of two months after written notice of intention to take proceedings. The Act arms the sanitary authority with exceptional powers, but has taken great precautions to protect the manufacturer against an oppresive exercise of those powers, and therefore these powers should be construed strictly. It is submitted that the notice of intention to take proceedings cannot

(1) 65 J. P. 776. (2) 5 F. 700.

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

be given until after the consent of the Local Government Board has been obtained. In the first place, a sanitary authority cannot give notice of an intention to take proceedings until they know whether they are in a position to do so, and they cannot know that until the Local Government Board have given their consent. Secondly, the manufacturer is to have liberty, notwithstanding this consent, to be heard before the sanitary authority on the question whether they shall take proceedings or not, but the only limit of time upon taking proceedings is the two months mentioned in s. 13. Therefore, if notice can be given before consent, the two months may, as in this case, expire before the consent is applied for or given, and then immediately upon the consent being given proceedings may be instituted. The Act does not require that notice should be given to the offender of the inquiry before the Local Government Board, which may therefore be ex parte, nor of the consent when given; consequently the manufacturer might never have an opportunity of stating his case, either before the Local Government Board or before the sanitary authority, before the proceedings are taken. The most reasonable construction of ss. 6 and 13 is to say that the manufacturer is entitled to two months after the consent of the Local Government Board to enable him to prosecute the inquiry before the sanitary authority. That is the view which the Court of Session in Scotland has taken of the Act (which with some modifications applies to Scotland as well as to England) in *Midlothian County Council* v. *Oakbank Oil Co., Ld.* (1) On the other hand, the Divisional Court in this country took the contrary view in *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.* (2), but the Court gave substantially no reasons for their decision. *Haylock* v. *Sparke* (3), which will be relied on by the other side, was a decision on a different statute, and one ground for the decision of the Court in that case was that the object of the Legislature might have been wholly defeated upon any other view of the Act.

Danckwerts, K.C., and *Ellison*, for the plaintiffs. There are two conditions to be performed by the sanitary authority before

(1) 5 F. 700. (2) 65 J. P. 776.

(3) (1853) 1 E. & B. 471.

they can take proceedings—(1.) giving notice of their intention to take proceedings, (2.) obtaining the consent of the Local Government Board; but the Act nowhere prescribes in what order those conditions shall be performed, and therefore the sanitary authority are at liberty to perform them in any order they please, and they may give notice of their intention to take proceedings notwithstanding that that intention is liable to be defeated if they do not obtain the consent of the Local Government Board: *Haylock* v. *Sparke*. (1) With regard to the point that the local inquiry by the Local Government Board might be ex parte, the universal practice of the Board is to hear the parties before giving their consent, and it is submitted that the Board cannot properly do their duty under s. 6 without giving notice of the inquiry to the person to be proceeded against in order that he may put them in possession of the facts. As regards the inquiry before the sanitary authority, the Act does not say that it must be subsequent to the consent of the Local Government Board. The words of the section are not "notwithstanding the consent of the Local Government Board," as the Scotch Court appeared to think, but "notwithstanding any consent." It would therefore be open to the manufacturer immediately on receiving notice under s. 13 to insist upon being heard before the sanitary authority against proceedings being taken.

SIR GORELL BARNES, PRESIDENT. In this case an action was brought under the provisions of the Rivers Pollution Prevention Act, 1876, subject, of course, to the point which has been discussed as to whether it was properly so brought, and the county court judge made an order whereby the defendants were required to refrain from causing or permitting the fall or flow into the river Colne of polluting water from their factory. The defendants appealed to the Divisional Court, and the Divisional Court ordered that judgment to stand and dismissed the appeal with costs. From that decision of the Divisional Court an appeal is brought to this Court. Now the point is whether the two months' notice of action, which is required by s. 13 of the Act, may be given

(1) 1 E. & B. 471.

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

The President.

before the consent of the Local Government Board has been obtained to proceedings being taken, or whether it must be given after that consent has been obtained. To make the point plain it is necessary to refer to the sections which have a bearing on the question. The learned President referred to ss. 4, 6, 8 and 13 of the Act and stated the facts, and he continued as follows:—] In my opinion the notice of August 6, 1904, was not a good notice.

It seems to me that when the whole of these sections are considered it is clear that there are two conditions to be performed before proceedings can be taken by the sanitary authority. One condition is that the consent of the Local Government Board must be given, and even if that consent be given the defendant may still object that the proceedings should not be taken till he has been heard by the sanitary authority, who are then to determine, notwithstanding that consent has been obtained, whether the proceedings shall or shall not be taken. The other condition is that the proceedings are not to be taken until the expiration of two months after the notice of the intention to take such proceedings has been given. The plaintiffs' case is that these are two independent conditions; that notice may be given at any time after the act complained of, and that on the expiration of two months from the giving of the notice proceedings can be taken provided that in the meantime, or if necessary after waiting some time, the consent of the Local Government Board has been obtained. The defendants say that that is not the intention of the Act, but that the intention is that the consent must be obtained before the notice is given. My view is that the defendants' contention is correct. It seems to me that the intention of s. 13, having regard to the very stringent regulations of the previous sections, was that the notice should be given at a time when the persons who gave that notice were in a position to act upon it, having obtained the previous consent of the Local Government Board for that purpose. When s. 6 is fully and carefully considered it appears to me to be reasonably obvious that that is the only satisfactory way of carrying out the provisions of the Act, because otherwise it would seem to follow that if the notice were given and had expired and the consent of

the Local Government Board were then obtained, proceedings could at once be taken, and there would be great difficulty in the position which would then be created. It is true that the defendant might still raise an objection to the proceedings being taken under s. 6 and have the opportunity of being heard, and would thus delay the time when the proceedings could actually be gone on with. But the whole scheme of this Act seems to me to lead to the reasonable conclusion that the intention was that the proceedings should not be taken until two months after the plaintiffs were in a position to take them. That is a short statement of the view which I entertain about this case.

The only other matter which I need refer to is this. There have been decisions both in this country and in Scotland upon this question. In this country there has been a decision of the Divisional Court in the case of the *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.* (1) In that case the judgments so far as they are set out in the report, are to be found in the interlocutory observations of the learned judges who heard the case, Ridley and Bigham JJ. In substance they thought that the two matters were independent, namely, the consent and the notice. The judgments at the conclusion of the case contain no reasons, and merely state that in their Lordships' opinion the conclusion of the county court judge was correct. In Scotland there has been a case of the *Midlothian County Council* v. *Oakbank Oil Co., Ld.* (2), the facts of which, so far as dates are concerned, are similar to those in the present case; and there the judgment of the Court was delivered by Lord Kinnear, the other judges who concurred in the judgment being the Lord President and Lord McLaren. I do not mean to read the whole of that judgment—it is a long one—and I do not intend to say that I agree with every expression which is to be found in the course of it, but, in substance, that judgment is in accordance with the opinion which I have arrived at, namely, that the notice must be a notice by a person who at the time of giving it is in a position to give it and to proceed upon it upon the expiration of the two months. There is, however, one passage from that judgment which I propose to read, in which Lord Kinnear says: "This

(1) 65 J. P. 776. (2) 5 F. 700.

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

The President.

is the only construction which will enable the restriction contained in s. 13 to be read in harmony with the restrictions contained in s. 6."

The only other case I need refer to is a case which was cited by the plaintiffs of *Haylock* v. *Sparke*. (1) It is said that that case is very analogous to the present, and shews that the notice in such a case as this may be given and run out and the consent obtained in the course of that time or afterwards. Well, in the first place, that case was not decided on this statute. It does not appear to me to be in pari materia, and the considerations which led to that decision appear to me inapplicable to the case with which we are dealing. One of the main reasons for the decision in that case was that the party who was injured would be barred of his remedy if the view which was expressed by the Court were not adopted. In this case it seems to me that the position is of a converse character to that which existed in that case, and that the more harmonious working of these sections is to be found in holding that the notice must be given after the plaintiffs have obtained the consent of the Local Government Board, which is a condition precedent to these proceedings.

For these reasons it seems to me that the judgment of the Court below should be reversed, and also the judgment delivered by the county court judge; and in view of the fact that we are construing an Act which applies to Scotland as well as to England, although the Secretary for Scotland is substituted for the Local Government Board, I think it is some satisfaction to feel that the law with regard to this matter can be laid down in the same way in both countries. My view, therefore, is that the appeal should be allowed.

FARWELL L.J. I agree. The question turns on the construction of the Rivers Pollution Prevention Act, 1876. Part III. of the Act relates to manufacturing and mining pollutions. Parliament has created a new statutory offence, and has provided that the persons to take proceedings to prevent such offences shall be the local sanitary authority who have

(1) 1 E. & B. 471.

obtained the consent of the Local Government Board and nobody else; and a restriction is placed on the right of that authority to take such proceedings by s. 13, which says: "Nor shall proceedings in any case be taken under this Act for any offence against this Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender." It might be said that the only persons who can lawfully intend to take such proceedings are the persons who are lawfully entitled to do so, namely, a sanitary authority who have obtained the consent of the Local Government Board. I do not propose to rest my judgment on so narrow a ground as that, and I will therefore assume that the words might equally well mean notice of an absolute intention or notice of a conditional intention to take proceedings. In this case the notice cannot be absolute, because that would be unlawful as they had not obtained the consent. Does the notice referred to in s. 13 therefore include notice of a conditional intention? In order to ascertain whether that can be so or not I look at the other sections of the Act. And I find that the Legislature is careful, while interfering to prevent pollution, to see that no unreasonable interference with industries and manufactures is created, and that no material injury will be inflicted by the proceedings upon the interests of the industry. It accordingly directs that, with regard to proceedings by a sanitary authority of any district which is the seat of any manufacturing industry, the Board shall make due inquiry into two matters—first, whether there are practicable available means to prevent the pollution; and, secondly, whether the general interests of the industry will be injured. Whether it be or be not the case that notice of that inquiry must be served on the person who is alleged to be the offender I do not think it necessary to determine. Lord Kinnear in the Scotch Court thought it was not. The Act does not in terms say so, but it may be that it is imposed by the words "after due inquiry," and it may be that such inquiry could not be duly held in some cases without notice to the person alleged to be the offender. It may be, again, that in other cases such inquiry could be so held. The Board send down to inquire by reason

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

Farwell L.J.

of the provision of the Act to which I have just referred, and it is for the Board to say what is a due inquiry and who ought to be served. But however that may be, whether the party to be charged is or is not to be served, it is plain that there is no provision which requires service on him of any notice of the final determination of the Board whether they will or will not consent.

Now, bearing that in mind, the next paragraph of clause 6 provides that "any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority"—to what?—"to such proceedings being taken." Obviously it is possible, unless the notice of intention to take proceedings can be given only after the consent has been obtained, and not a notice conditional, that a notice might be given which would expire before, or on the very day on which the consent was obtained, and that immediately the consent was obtained proceedings might be instituted so that the party charged might be deprived of any opportunity under this part of clause 6 of objecting to such proceedings being taken. To my mind it was manifestly intended that there should be a period during which the party to be charged should have an opportunity of bringing before the sanitary authority reasons why proceedings should not be taken against him, and that the notice under s. 13 must be an absolute notice by a person entitled, and not a conditional notice by a person who may or may not be in a position to bring such action.

Further, it is not unworthy of consideration that it is somewhat hard on a party to give him notice that if a certain consent is obtained proceedings will be taken against him so that he is left in doubt whether he ought or not to take steps to collect evidence or otherwise prepare to defend himself. The Scotch Court has considered that "notwithstanding any consent of the Local Government Board" means after any consent of the Local Government Board. If the words were as Lord Kinnear reads them, "notwithstanding the consent of the Local Government Board," I think it would be clear

that it meant after, and only after. Mr. Danckwerts says that the word "any" makes it mean whether any consent has been given or not. I myself do not think that is the true meaning. I think the meaning really is, notwithstanding the consent of the Local Government Board, whether such consent be an absolute or conditional consent or subject to terms or anything of that sort, and that the Scottish Court was well founded in saying that the words mean after any consent of the Local Government Board.

With regard to the other two decisions, the reasoning in the English Court is not very satisfactory, and I agree with the paragraph in the judgment of the Scotch Court which the President has already read. To my mind the principle of the case of *Haylock* v. *Sparke* (1) is really an authority in favour of the view which we are expressing. I do not say that the words of this Act are not open to the construction which has been put on them by the Divisional Court in the judgment which we are now asked to overrule. It is possible on the mere wording it might so be, and so it was in the case before Lord Campbell. But the principle on which that case was decided is thus stated by Lord Campbell in his judgment: "Were not this so, the party injured might be barred of his remedy altogether; for, by s. 8 of the same statute, the action must be commenced 'within six calendar months next after the act complained of shall have been committed.'" In other words, we are bound to construe the Act ut res magis valeat. Apply that to the present case. I have already shewn that on the construction which we are invited by Mr. Danckwerts to put upon the Act the party charged with an offence might be deprived of the opportunity of objecting before the sanitary authority to any proceedings being taken. The same principle of ut res magis valeat influences me in saying that the true view of this Act is that taken by the Scotch Court, and, as the President has said, it is certainly very desirable that the same view should prevail in both countries of the same Act.

BUCKLEY L.J. The Rivers Pollution Prevention Act, 1876, is so expressed that the determination of the question before the

(1) 1 E. & B. 471.

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

Buckley L.J.

Court is not, I think, easy. I am far from saying that there is not room for the contention which has been pressed upon us by the respondents; but I think that contention fails. The principle which I think is to be applied to the determination of the matter is this: Upon reading this Act of Parliament I find a plain intention that the manufacturer shall be afforded a great deal of protection. If it is proposed or intended to attack him, he is to have ample opportunity, before proceedings are taken, to assert, successfully if he can, that proceedings ought not to be taken against him. Bearing that in mind, I must read the Act of Parliament and see how I ought to answer this question: Can the notice under s. 13 of intention to take proceedings be given before the sanitary authority have become clothed with the consent of the Local Government Board, which is a condition precedent to their action? Let me assume for a moment that the notice can be given before the consent has been obtained, what would be the result? Notice is given, we will suppose, when no proceedings have been taken to obtain the consent of the Local Government Board. Then proceedings are taken to obtain that consent, and it is obtained. In the interval, suppose two months to have elapsed. The result is that the very next day proceedings can be instituted against the person who is said to have committed an offence against the Act. If this is so the party attacked, if desirous of having the benefit of objecting before the sanitary authority under s. 6, must either object at a time when there is no constat that there will ever be proceedings, because it may be that the consent of the Local Government Board will be refused, or if he waits until the consent is given will be deprived of the protection intended to be given him by the last clause of s. 6. The words towards the end of that clause, "whether such proceedings as aforesaid shall or shall not be taken," shew that the investigation before the sanitary authority under that section is contemplated as something which will precede the taking of proceedings under the Act. In the case I have put the party attacked would have no opportunity of availing himself of such protection. I agree that as matter of practice and justice and convenience the person intended to be attacked would no doubt be given an opportunity of attending

upon the inquiry held by the Local Government Board; but, upon the construction of the Act of Parliament, the Act does not require that he be so summoned, and he could not complain, so far as the Act is concerned, if he were not summoned. The result is that for the purposes of construction I may assume that the consent of the Local Government Board may be obtained by the sanitary authority without any notice to the person to be charged of the inquiry before the Board, and there is no provision in the Act that notice of the consent is to be given him after it has been obtained. So that he would be left in this position, that for the purpose of this last clause of s. 6 he might be deprived of the benefit which the Act intended to give him of asserting before the sanitary authority before the proceedings were commenced that the proceedings never ought to be commenced. That line of reasoning induces me to think that I ought not to adopt a construction which would lead to that result.

Then let me look at what is in favour of the other view. In the first place, if the notice can be given before the consent has been obtained, it must be a conditional notice. It would be a notice that, if and when the consent has been obtained, the sanitary authority will take the proceedings. A conditional notice is not a thing which the Act of Parliament seems to contemplate. That is a strong reason in favour of saying that the consent must be obtained before the notice can be given.

Further, the joint effect of ss. 6 and 13 is no doubt that proceedings shall not be taken until the consent of the Local Government Board has been obtained, nor until the expiration of two months after written notice of the intention to take proceedings has been given, and there is no statement as to the order in which these may be satisfied. But logically the latter would follow the former upon the ground that the only person who can give notice of an intention is a person who by being clothed with the consent is in a position to give effect to the intention of which he gives notice.

There was one other point which occurred to me, which is this—whether it could be said that the notice given before the consent has been obtained might be treated as a continuing

C. A. 1907

WEST RIDING OF YORKSHIRE RIVERS BOARD v. ROBINSON BROTHERS.

Buckley L.J.

notice, so that if after the consent was obtained two months elapsed the action could be maintained. I think not. The answer to it is twofold. The first answer is that, if so, the notice would be a conditional notice, with which I have dealt already; and the second is that, inasmuch as the Act does not require that the man shall have notice of the consent being obtained, it would leave him, or might leave him, in a position of not knowing that the two months had commenced to run.

We have been pressed with the decision in the case of *Haylock* v. *Sparke*. (1) I think that case is distinguishable. The point there was that under the Act of Parliament a justice of the peace who had made an order without jurisdiction or in excess of jurisdiction had done an act which completed the whole cause of action. The Court held that the provision of s. 2 of 11 & 12 Vict. c. 44, that an action should not be brought until after the conviction had been quashed was not a provision which rendered the quashing of the conviction part of the cause of action, but was a provision which suspended the right to sue in respect of a complete cause of action until another event had happened. I do not think that is this case. In s. 4 of this Act of Parliament the provision is that a certain person shall, "subject as in this Act mentioned," be deemed to have committed an offence. Then the effect of s. 6 is that, inasmuch as no proceedings can be taken without consent, there is no actionable offence until those provisions of the Act have been complied with, which enable somebody to sue. The words "subject as in this Act mentioned" in s. 4 seem to me to have this effect, that, unless and until by virtue of the machinery of the Act there comes into existence a possible plaintiff, there is no actionable offence under the Act of Parliament. If so, *Haylock* v. *Sparke* (1) cannot apply. The second ground is this, that as I read that case the Court came to the conclusion that they did on the pleading and for the reason that, if they had held otherwise, the remedy might have been precluded altogether, because, having regard to the two periods of time mentioned in the Act, the time of six months under s. 8 of the Act might have expired

(1) 1 E. & B. 471.

before the conviction had been quashed. That is a reason which does not apply in this case.

I arrive, therefore, at the conclusion that it is necessary here that the consent of the Local Government Board should be obtained before the notice under s. 13 can be given, and I am glad to come to this conclusion, because, inasmuch as the Court in Scotland has arrived at the same conclusion, though perhaps not exactly by the same course of reasoning, it is a satisfaction to know that the construction should be held to be the same in the two divisions of the kingdom. It follows that, in my judgment, the decision of the Divisional Court in the *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.* (1) was erroneous.

Appeal allowed.

Solicitors: *Van Sandau & Co., for Mills & Co., Huddersfield; Clements, Williams & Co., for Trevor Edwards, Wakefield.*

H. B. H.

WEST HAM CORPORATION *v.* SHARP.

1907
Jan. 17.

Street—Private Street Works—Apportioned Expenses—Charge on Premises—Sale—Action—Private Street Works, 1892 (55 & 56 *Vict. c.* 57), *s.* 13.

An action will lie at the suit of an urban authority for a declaration that the plaintiffs are entitled under s. 13 of the Private Street Works Act, 1892, to a charge on premises for the apportioned expenses incurred by the plaintiffs in executing works under the Act, and payable by the defendant in respect of the premises, and for an order that the premises may be sold and for the appointment of a receiver.

APPEAL of the plaintiffs from the judgment of the county court judge of Bow.

The action was brought for a declaration that the plaintiffs were entitled under s. 13 of the Private Street Works Act, 1892 (2), to a charge on certain premises at Plaistow for the sum

(1) 65 J. P. 776.

(2) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 13 (1): "Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand

1907

WEST HAM CORPORATION v. SHARP.

of 48*l.*, being the balance of the apportioned expenses incurred by the plaintiffs in executing private street works under s. 6 of the Act and alleged to be payable by the defendant in respect of the said premises, and that the charge was entitled in priority over any other mortgage or charge on the premises, if any; and for an inquiry whether there were any encumbrances affecting the premises; and for an order that the premises might be sold; and for the appointment of a receiver.

Evidence by affidavit having been given on behalf of the plaintiffs to prove the execution of the work and the apportionment of the expenses, the county court judge dismissed the action on the ground that s. 13 of the Private Street Works Act, 1892, rendered the action unnecessary.

The plaintiffs appealed.

E. Morten (*Danckwerts, K.C.*, with him), for the plaintiffs. The county court judge was wrong in holding that s. 13 of the Act rendered the action unnecessary. The section gives the urban authority the same remedies as regards sale and the appointment of a receiver as a mortgagee has under the Conveyancing Act, 1881, and although that Act by s. 19 gives a mortgagee power to sell or to appoint a receiver, it clearly contemplates applications to the Court for an order for sale (see s. 25, sub-s. 2); and orders for sale are matters of every-day occurrence in the Chancery Division. It is of importance to the plaintiffs to obtain an order of the Court, for otherwise in the event of a sale they would have to prove every step in the proceedings, and it is doubtful whether without an order they could pass the legal estate, and they have no means of ascertaining the existence of restrictive covenants or the terms

---

and remain charged (to the like extent and effect as under section two hundred and fifty-seven of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of four pounds per centum per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise as if they were mortgagees having powers of sale and lease and of appointing a receiver."

on which the land is held or let. [He referred to *Twickenham Urban District Council* v. *Munton* (1) and *Guardians of Tendring Union* v. *Dowton*. (2)]

Woodcock, for the defendant. The judgment of the county court judge was right. As regards the claim for a declaration that the plaintiffs are entitled to a charge on the premises, the action was clearly unnecessary, because s. 13 in terms gives the charge. It is also not necessary to come to the Court for an order for sale. No doubt under s. 257 of the Public Health Act, 1875, it was not possible for the local authority to sell without an order of the Court, but one of the objects of s. 13 of the Act of 1892 was to get rid of that difficulty; and it has done so by conferring on the authority the same powers under the Conveyancing Act, 1881, as if they were mortgagees, that is to say a power to sell without first getting an order of the Court. The suggested difficulty as to making a good title is met by s. 21 of the Conveyancing Act, and an order of the Court is not required in order to pass the legal estate: *Corporation of Birmingham* v. *Baker* (3); *In re Hodson & Howes' Contract*. (4)

DARLING J. I am of opinion that this appeal must be allowed. The action was brought by the plaintiffs for a declaration that they were entitled to a charge on certain premises under s. 13 of the Private Street Works Act, 1892, for an order for the sale of the premises, and for other relief. The county court judge dismissed the action on the ground that the provisions of s. 13 rendered it unnecessary for the plaintiffs to bring the action. I do not think that was a good ground for dismissing the action. I am not satisfied that it was absolutely necessary for the plaintiffs to obtain an order of the Court in the terms asked for by their particulars of claim, but it does appear that it is a useful and convenient course to adopt, particularly with regard to the question of making a good title if the plaintiffs should desire to sell the property. Therefore, although the order of the Court is not absolutely a sine qua non, it is nevertheless one which the plaintiffs were

(1) [1899] 1 Ch. 168.
(2) [1891] 3 Ch. 265.
(3) (1881) 17 Ch. D. 782.
(4) (1887) 35 Ch. D. 668.

1907

WEST HAM CORPORATION v. SHARP.

entitled to obtain, so judgment must be entered for the plaintiffs.

PHILLIMORE J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Hillearys.*
Solicitors for defendant: *Bramall & White.*

F. O. R.

1906
Nov. 1.

WILLIS *v.* YOUNG AND STEMBRIDGE.

Gaming—Lottery—Gratuitous Distribution by Newspaper Proprietors of Medals bearing Numbers—Notification of Winning Numbers in Newspaper—Possibility of obtaining Prize without actual Purchase of Chance—Gaming Act, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The proprietors of a weekly newspaper caused medals to be distributed gratuitously among members of the public; each medal bore a distinctive number and the words, "Keep this, it may be worth 100*l.* See the *Weekly Telegraph* to-day"; the winning numbers, which were arbitrarily selected by the newspaper proprietors and were unknown to the distributors, were published weekly in the newspaper. There were no coupons, and it was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, and the circulation in fact increased considerably during the progress of the scheme:—

Held that, although it was possible for an individual holder of a medal to obtain a prize without paying anything for his chance, the medal-holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, and that the scheme was a lottery within s. 2 of the Gaming Act, 1802.

CASE stated by an alderman of the City of London.

The respondents had been summoned on three informations (which were heard together) under 42 Geo. 3, c. 119, s. 2 (1),

(1) By the Gaming Act, 1802 (42 Geo. 3, c. 119), s. 2: "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or

charging the respondent Young with unlawfully keeping a certain place at 180 and 181, Fleet Street—(*a*) to exercise a certain lottery in the *Weekly Telegraph* newspaper, being a lottery not authorized by Parliament; (*b*) to expose to be played by numbers and figures a certain lottery in the *Weekly Telegraph* newspaper, being a lottery not authorized by Parliament; and (*c*) to expose to be played by a certain way, contrivance and device, called the "*Weekly Telegraph* Medal Scheme," a lottery not authorized by Parliament. The informations charged the respondent Stembridge with aiding and abetting the respondent Young.

The following facts (inter alia) were proved at the hearing. The respondent Stembridge was the responsible printer and publisher of the *Weekly Telegraph*, and was responsible for its publication in London, although it was printed in Sheffield. The respondent Young was the responsible manager of the London office of the paper at 180 and 181, Fleet Street, and was responsible for the distribution in London between March 3, 1906, and April 18, 1906, of medals referred to in a scheme, conducted entirely at the Fleet Street office, called the "*Weekly Telegraph* Medal Scheme." Each of the medals bore a distinctive number and the words "Keep this, it may be worth 100*l*. See the *Weekly Telegraph* to-day." The medals were handed in bulk of thousands to men for indiscriminate distribution, principally by putting them in letter-boxes at people's houses. The distributors had no knowledge of the winning numbers of the medals. The winning numbers were arbitrarily selected by a person in the employ of the paper, and the respondents accepted the

---

figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by Parliament; . . . . and every person so offending shall be deemed a rogue and vagabond . . . . and shall be punishable as such rogue and vagabond accordingly."

By the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 1, all provisions theretofore made relative to rogues and vagabonds were repealed, but s. 21 provides that "wherever by any Act or Acts of Parliament now in force it is directed that any person shall be punished . . . . as a rogue and vagabond . . . . for any offence specified in such Act or Acts, and not hereinbefore provided for by this Act, in every such case, whether such person shall or shall not have committed any offence against this Act, every such person shall be punished under the provisions, powers, and directions of this Act."

1906

WILLIS v. YOUNG AND STEMBRIDGE.

responsibility of the selection. The scheme was otherwise carried out substantially in the manner described in the issue of the paper of March 3, 1906, copies of which and of other issues of the paper weekly down to April 14, 1906, shewed successive stages of the scheme. (1) The paper was sold to the public for one penny, the price marked on it. The statements in the papers as to certain persons therein named having received prizes under the scheme were accurate. There was no condition that a person holding one of the medals entitling him to a prize must purchase or produce a copy of the paper in order to secure the prize. In the event of a person walking into the office with a medal, information would have been gratuitously afforded to him as to whether the medal entitled him to a prize or not, and a file of the paper was always available at the office for inspection by any person free of charge; the paper was also supplied to, and could be inspected at, most reading-rooms and many hotels. One of the medals was never given at the same time as a copy of the paper was sold. If a person came to the office and asked to be given a medal, he would be given one without any inquiry being made as to whether he had purchased a copy of the paper, and if he came there and bought a copy of the paper and then asked for a medal the medal would not be given to him. There was no connection between the actual distribution of the medals and the sale of a copy of the paper. Under no circumstances was anything charged for the medal, nor could a purchaser of a copy of the paper in any way secure the possession of a medal as a condition of the purchase. There was no coupon in the paper. Special instructions were always given to the distributors of medals (who were never employed to sell the papers), and the general instructions given to them were to omit newsagents in their distribution and to place a medal in each letter-box in every street. If a person living in the country had written to the office to ask for a medal it would have been sent to him without either a stamped envelope or a penny stamp being sent to the office, and thousands of medals had been so sent. The proprietors of the paper hoped to get increased circulation of their paper and increased profits by the scheme, the object of

(1) In each of the papers a series of winning numbers was published.

which was to advertise the paper and thereby get an increased circulation. The object of distributing the medals was to induce persons to inspect the paper. The proprietors' hope and intention in distributing the medals was that the recipients might be induced to purchase copies of the paper. The scheme had been successful, and the object the proprietors had in view had been attained in a steadily increasing manner, the circulation of the paper having increased about 20 per cent. during the progress of the scheme. The proprietors did not refuse to sell at their office a copy of the paper to any stranger applying for it. They gave a medal for nothing to any stranger who came into the office and asked for one, without any inquiry as to whether he had purchased a copy, but they did not give a medal to the purchaser of a paper at the time of the purchase; a person purchasing a paper at the office might have received a medal the day before, or might receive one the day after, the purchase. The scheme began about the end of September, 1905, and had been continued weekly; no date had been fixed for the end of the scheme, which now cost about 200*l.* per week, but at first cost less.

For the appellant it was contended that the scheme constituted a lottery within the definition of that word given in Webster's Dictionary as "a distribution of prizes by lot or chance," and also came within the preamble to the Gaming Act, 1802 (42 Geo. 3, c. 119), under which the informations were laid; that persons were expected to pay a penny for a copy of the paper because of the chance of getting a prize, and did pay that sum because of that chance; that the smallness of the sum so paid was immaterial; that the scheme was in reality a game played by two parties, and that the person who got a medal did not necessarily win a prize, even if he got a medal with a winning number thereon, as there was a fixed period for sending in the medal and applying for the prize; that the scheme was a new contrivance or device intended to be covered by the Gaming Act, 1802, and that the chance was not complete on possession of one of the medals, but on acquiring the knowledge that the holder thereof held a winning number.

For the respondents it was contended that the scheme was a

1906

WILLIS v. YOUNG AND STEMBRIDGE.

legitimate attempt to advertise a genuine article, and was not a lottery within the definition referred to in Webster's Dictionary, and did not come within the preamble to the Gaming Act, 1802; that to constitute a lottery there must be a risk of loss, which was absent from the scheme; that the holder of a medal gave nothing for it, that a medal was not given to him when he bought a copy of the paper, and that it might be picked up by, or given to, any person; that a medal was of no intrinsic value whatever, although it represented what might be of value; that in all the decided cases on the Gaming Act, 1802, there was a sale of something, whereas in this scheme the chance of obtaining a prize was brought about simply by getting a medal, and that the purchase of a copy of the paper was independent of the ownership of a medal.

The following cases were cited: *Taylor* v. *Smetten* (1); *Morris* v. *Blackman* (2); *Hall* v. *McWilliam* (3); *Reg.* v. *Harris* (4); *Allport* v. *Nutt* (5); *Hunt* v. *Williams* (6); *Barclay* v. *Pearson.* (7)

The learned magistrate was of opinion that the scheme was not a lottery as contemplated by the Gaming Act, 1802, and dismissed the informations. The question for the Court was whether, upon the above statement of facts, the learned magistrate had come to a correct determination and decision in point of law.

Avory, K.C. (*R. D. Muir* with him), for the appellant. The respondents should have been convicted. The object of the scheme was to induce persons to buy the paper in order to see whether they had got a prize number, though they might be told it gratuitously if they took the trouble to go to the newspaper office. On the findings in the case the scheme was a distribution of prizes by chance, and therefore answered the definition of a lottery: *Taylor* v. *Smetten.* (1) It is immaterial that the paper, if purchased, would be full value for the money paid for it: *Hall* v. *McWilliam.* (3) It is true that the distribution of the medals was not necessarily connected with the sale of the paper,

(1) (1883) 11 Q. B. D. 207.
(2) (1864) 2 H. & C. 912.
(3) (1901) 65 J. P. 742.
(4) (1866) 10 Cox, C. C. 352.
(5) (1845) 1 C. B. 974.
(6) (1888) 52 J. P. 821.
(7) (1893) 9 Times L. R. 269.

and that a person who got a medal might conceivably get a prize without himself paying any money for his chance; but that is immaterial in view of the findings that the scheme was devised in order to promote the sale of the paper, and that the sale had in fact increased during the progress of the scheme.

Marshall Hall, K.C. (*R. E. Moore* with him), for the respondents. The learned magistrate was right in holding that this scheme was not a lottery. There is no decided case in which there has been a conviction unless there has been an actual purchase of a chance of a prize.

[LORD ALVERSTONE C.J. Looking at the whole of the circumstances of the case, is it not plain that the circulation of the paper increased by reason of people getting these medals?—in other words, did not purchasers of the paper contribute substantially to the prize fund?]

No, for it was not necessary to buy a paper in order to win a prize. In *Taylor* v. *Smetten* (1) a lottery was no doubt defined as a "distribution of prizes by lot or chance"; but that case is not in point, for there prize coupons were only obtainable by purchasing packets of tea, and only those who actually parted with their money had a chance of a prize; here the medals were not paid for. In *Reg.* v. *Harris* (2) a shilling had to be paid for a ticket giving a chance of a prize. In the Century Dictionary and in the Oxford English Dictionary the purchasing of tickets is an essential part of the definition of the word "lottery." If the present scheme is a lottery, the drawing of a debenture is equally so. There is no risk of loss in the present scheme, and that is as much a necessary ingredient of a lottery as is the chance of gain.

Avory, K.C., in reply, referred to *Allport* v. *Nutt.* (3)

LORD ALVERSTONE C.J. I cannot entertain a doubt that the decision of the learned magistrate was wrong, and that the respondents ought to have been convicted of the offence charged. We are fully aware of the ingenuity of the gentlemen who originate these schemes, and of their advisers, and doubtless

(1) 11 Q. B. D. 207. (2) 10 Cox, C. C. 352.
(3 1 C. B. 974.

1906

WILLIS v. YOUNG AND STEMBRIDGE.

Lord Alverstone C.J.

this will not be the last attempt to devise a scheme to keep outside the statute dealing with lotteries; I do not say to evade the statute, for a practice is either within a statute or not. Now it has been admitted by the respondents' counsel that if a coupon had been delivered with each medal, and a charge of a penny had been made, the scheme would undoubtedly have been a lottery, but it is contended that the fact that no charge was made for the medal made all the difference. In my opinion this Court would be stultifying itself were it to give any effect to the ingenious argument by which this ingenious device was supported. If we look merely at the position of the holder of one of these medals, it is perfectly true that he may not have bought a copy of the newspaper; he may only know by oral information that he has won a prize. But the fact remains, and has been found by the magistrate, that the scheme was devised by the proprietors to induce persons to inspect the paper. I do not know why the learned magistrate uses the word "inspect," and not "buy," which is obviously what he really meant, but I take the word actually used; under ordinary circumstances inspection of a newspaper would mean getting hold of the paper and reading it. We know the mischief which was aimed at by the Gaming Act, 1802, and if we read the preamble to that Act we must ask ourselves how many of the recipients of these medals, who are unable to go into the office and inspect the paper for nothing, would pay a penny for the paper, not for the purpose of reading it in the ordinary way, but in order to see whether the number of their medal is the lucky one. The case goes on to say that the proprietors' hope and intention in distributing the medals was that the recipients might be induced to purchase copies of the paper; that the scheme had been successful; that the objects the proprietors had in view had been attained in a steadily increasing manner; and that the circulation of the paper had increased by about 20 per cent. during the progress of the scheme. If this is an honest scheme, as I assume it to be, the suggestion is that there appear periodically in the paper announcements of the names of the prize winners, and that many hundreds of pounds are given away to them. The money for the prizes, however, comes out of the receipts

of the respondents, and these in their turn come, to a considerable extent, from the people who buy the paper, although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals therefore contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper, and also the money for the prize winners in this competition, come. I adopt the definitions of "lottery" which have been cited to us in the present case, and, looking at the real substance of the scheme, I think that it falls within the narrowest and most limited definition of a lottery, though it is not necessary for the purpose of our decision to go so far as that. If the scheme had been to deliver a medal with each copy of the paper to the person buying that copy, there could have been no question that it would have been a lottery; in the present case the mischief is really the same, and an inducement is held out to the same class of people to buy copies of the paper, and I am glad to say that I know of no statute, and of no judicial decision, which compels me to hold that this scheme is not a lottery.

RIDLEY J. I agree.

DARLING J. I agree. But I wish it to be clearly understood that I am not prepared to hold that an absolutely free and gratuitous distribution of chances, none of which have been paid for, would be a lottery. In the present instance all chances are paid for in the mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance. The person who distributes the chances is therefore paid if the sale of the newspapers be looked at as a whole, although some chances are given away.

Appeal allowed.

Solicitor for appellant: *Sir Homewood Crawford, City Solicitor.*
Solicitors for respondents: *Sharpe, Parker & Co.*

W. J. B.

1906
Nov. 13.

SCOTT *v.* DENTON.

Poor Rate—Distress—Charges—"Keeping Possession" of Goods seized—"Man in Possession"—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1; *Sched.—Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *s.* 23.

A constable, who had levied a distress for poor rates for an amount not exceeding 20*l.*, removed the goods seized to a police station for safe custody; they were there locked up in a cupboard, the key of which was hung up in the police station; after remaining there for five days they were sold by public auction:—

Held that, under a table of fees authorized by s. 23 of the Police Act, 1890, and approved by a Secretary of State, the constable was entitled to make a charge of 1*s.* per day for "keeping possession" of the distress.

Per Lord Alverstone C.J.: The expression "man in possession," as used in the schedule to the Distress (Costs) Act, 1817, means a man in possession of the goods seized, and is not confined to a man in possession upon the premises where the seizure took place.

Appeal from a decision of the judge of the Otley County Court.

The plaintiff being in arrear to an amount not exceeding 20*l.* in respect of poor rate, a warrant of distress was duly issued against him by justices under the Distress for Rates Act, 1849, for the recovery of the amount. The warrant was directed to the overseers of the poor and to the constables of Guiseley and to all other peace officers of the West Riding, and was handed to the defendant, a police constable, for execution. The defendant made a levy on the plaintiff's premises and seized a silver article belonging to the plaintiff, which he removed from the premises and took to the police station at Guiseley, where he locked it up in a cupboard in a room used by the members of the police force; the key was not kept by the defendant personally but was kept hanging up in the police station. After the lapse of five days the distress was removed and sold by public auction. In the account rendered by the defendant to the plaintiff of the charges in respect of the distress occurred the item "five days' charge for keeping possession of the goods distrained, 5*s.*," which was a charge sanctioned by a table of fees made by the authority under s. 23 of the Police Act, 1890,

1906

SCOTT v. DENTON.

and sanctioned by the Home Secretary as required by that section; the fee allowed was, "keeping possession of goods per day under each distraint, 1*s*." The plaintiff brought the present action to recover the 5*s*., alleging the charge to be illegal and not justified by any statutory or other authority. The learned county court judge was of opinion that there had been no man in possession in any real sense during the five days in question, and that the charge of 5*s*. for the man in possession was not legally made; he therefore gave judgment for the plaintiff for the amount claimed, and the defendant appealed.

Danckwerts, K.C. (*W. Valentine Ball* with him), for the defendant. The county court judge was wrong in his view that no services had been rendered which entitled the defendant to make the charge, and that there had been no man in possession during the five days in any real sense of the term. It is clear that where goods are distrained for poor rate they cannot be impounded on the premises, except by agreement; it was therefore not possible to do otherwise than was done in the present case, and it can make no difference in the legal rights of the parties that the distress was kept in safe custody at the police station. A man in possession need not be in possession on the premises where the distress is levied; it is sufficient if he is in possession of the goods seized. There is no question as to whether the charge was a reasonable charge for taking a distress within the meaning of the Distress for Rates Act, 1849, for that Act does not operate to overrule the Distress (Costs) Acts of 1817 and 1827: *Coster* v. *Headland*. (1) The charge sanctioned by the table under the Police Act, 1890, is one of a shilling a day for "keeping possession," which does not mean having manual possession of the distress, but taking care of it while awaiting sale. The warrant was not addressed to the defendant, or to any particular constable, but to all the constables as a class, and they were all as a body "keeping possession" of the distress.

Longstaffe, for the plaintiff. The county court judge was right. The only expenses which can be deducted from a distress for poor rate are those which are authorized by the schedule to the

(1) [1906] A. C. 286.

1906

SCOTT v. DENTON.

Act of 1817, which, it is true, applied originally only to distresses for rent, but which was extended to distresses for poor rates by the Act of 1827. Further, the possession must be real, and the work charged for must be really done. The only head under which the defendant would be entitled to make such a deduction is " man in possession " in the schedule to the Act of 1817 ; but the defendant was not a man in possession, for there can be no such thing as a man in possession in a distress for poor rates ; there can only be one in a distress for rent. As there could be no man in possession, neither could there be any such thing as " keeping possession," and the charge made was wholly unauthorized.

Danckwerts, K.C., in reply, cited *Woods* v. *Durrant.* (1)

LORD ALVERSTONE C.J. I am of opinion that this appeal should be allowed. The learned county court judge was, I think, misled by the suggestion that *Coster* v. *Headland* (2) decided more than it did in fact decide. It decided that the view which we took in this Court in *Hill* v. *Pannifer* (3) was wrong. Our view was that the Distress for Rates Act, 1849, being a special Act applicable to the poor rate, allowed reasonable charges to be made in the case of a distress, and impliedly repealed the provisions of the Distress (Costs) Act, 1817, as applied by the Distress (Costs) Act, 1827, to distresses for poor rates, and therefore gave a right to include in the levy the reasonable charges of taking, keeping, and selling a distress. The decision of the House of Lords amounted only to this : That the provisions of the Act of 1817, as extended by the Act of 1827, were not affected by the Act of 1849, and therefore in cases of distress for poor rate for an amount not exceeding 20*l.* the maximum charge in the scale given in the schedule to the Act of 1817 still applied. The Act of 1817 allows, in cases of distress for a sum not exceeding 20*l.*, a charge of 2*s.* 6*d.* a day for a man in possession ; and it has been contended before us that this means only a man in possession on the premises where the distress was levied ; but I think it is clear upon the authorities, as well as upon principle, that it means a man in possession of the goods seized, but not

(1) (1846) 16 M. & W. 149. (2) [1906] A. C. 286.
(3) [1904] 1 K. B. 811.

necessarily in possession of them on the premises where they were seized. A man in possession is therefore entitled under that schedule to a maximum fee of 2*s.* 6*d.* per day. The county court judge came to the conclusion that because the constable put the distress in a cupboard at the police station and did not keep the key in his own possession, there was no man in possession in the real sense of the term, and I think that that conclusion was wrong; I do not, however, understand him to mean that, if the constable had kept the distress at the police station in his own individual custody, he would not have been entitled under the Act of 1817 to make a charge. It is clear that *Coster* v. *Headland* (1) is not an authority against the defendant's contention.

Then there is the fact that in distresses for poor rate the expression "man in possession," in the ordinary sense of a man in possession on the premises where the goods were seized, cannot apply. The next subject for our consideration is the Police Act, 1890, and it is important to note that it was conceded that police constables constantly levy distresses for poor rate; that the distress warrant is addressed to the constables as a class, and not to an individual constable, and that there is no question of a particular fee for an individual constable. The Act of 1890 says, in s. 23, that every police authority is to submit a table of fees, in respect (inter alia) of the execution of warrants, for the approval of a Secretary of State; the fees received for the work of the constables go to a common fund. One of the fees approved in this case was a fee of 1*s.* a day for "keeping possession" of the goods distrained. I think that the expression "keeping possession" is used because the distress could not remain on the premises, it being a distress for poor rate, and the constable could not remain on the premises as an ordinary man in possession. I have come to the conclusion that the constable in fact did the act for which the charge was made, and that the charge made for it is not in excess of the authorized charge.

DARLING J. I am of the same opinion. The Police Act, 1890, by s. 23, authorizes the demanding of fees by a police authority

(1) [1906] A. C. 286.

1906

SCOTT v. DENTON.

Darling J.

for (inter alia) the execution of warrants, and those fees are regulated by a table approved of by the Secretary of State, who, acting under that statutory authority, has approved of a fee of 1*s.* a day for "keeping possession" of goods seized under a distress for poor rates. The constable who executes the distress warrant does not benefit personally by the fee, because the warrant is addressed to the police as a body. When the constable levied the distress he earned the authorized fee for doing so; but the fee did not go to him. He took the article to the police station, and locked it up in a cupboard, where it remained in the custody of all the constables, who were authorized as a body to charge a fee of 1*s.* a day for keeping it. I am unable to see that the charge cannot be made because some act was not really done within the meaning of s. 1 of the Act of 1817; here the act for which the charge was made was really done, for the distress was kept by the authority to whom the warrant was directed. It is said that nothing was chargeable at all, because the Act of 1817 contains a complete code of charges in itself, and does not provide for the payment of a fee to a person who keeps possession of goods seized under a distress for poor rate. I cannot agree with that contention; if it is sound, the law would clearly favour landlords, because if live stock were seized under a distress for rent a fee could be charged, although they might be kept on the premises where they were seized, while in the case of a distress for poor rate this would not be so, because the goods must be removed from the premises, and so, although expense might be incurred in feeding them, no fee would be payable to the person who kept possession of them; this would work manifest injustice. I cannot see that the Act of 1817 prohibits what has been done in the present case by virtue of the Police Act, 1890, which authorizes the making of such a charge as has been made. It seems to me that the county court judge misunderstood the effect of this legislation, for he says in his judgment that the Act of 1827, which extends the provisions of the Act of 1817 to distresses for poor rate, expressly provides that, where the amount is under 20*l.*, the costs and charges allowed by the Act of 1817, and no other, shall be taken and payable as the costs and charges of the levy and of the disposition of the distress; he adds: "I am of

opinion, therefore, that the charge of 5*s.* for a man in possession was not legally earned." If the fee charged had been in excess of that allowed by the Act of 1817 it is difficult to see how the Secretary of State could have authorized it; but it is less, so that that point does not arise for our consideration. The learned county court judge then says: "These fees are said to be payable to constables, but I think it means that they are payable by those who employ them. I do not think it repeals the provisions of the earlier Acts, or that it can affect the plaintiff, who did not employ the constable." I agree that the Act of 1890 does not repeal the earlier Acts, but it provides for cases which are not exactly provided for in them. I think also that when the Act of 1890 speaks of fees chargeable and allows the Secretary of State to fix them, it deals not only with the case where constables are employed by private persons, but also with cases where they are employed by the public authority. If the fees are to be paid by the persons employing the police, they would in the present case be paid by the justices, and not by the police authority, nor by the person whose goods were distrained.

Appeal allowed.

Solicitors for plaintiff: *Clements, Williams & Co., for Trevor Edwards & Co., Wakefield.*

Solicitors for defendant: *Paterson, Snow & Bloxam, for Harrison & Son, Leeds.*

W. J. B.

1906
Dec. 11, 12, 18.

GENERAL COUNCIL OF THE BAR (ENGLAND) *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp Duty—"Receipt"—Counsel's Brief—Statement of Fees—Counsel's Name or Initials placed against Fee—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 101; *Sched. I.*

When counsel, after payment of a fee of 2*l.* or upwards, places his initials or name against the fee on his brief or at the foot of a statement of fees, the document is liable to the stamp duty of 1*d.* as a receipt within the meaning of s. 101 and the heading "Receipt" in the First Schedule to the Stamp Act, 1891.

Case stated by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891, s. 13.

On February 2, 1906, two instruments were presented on behalf of the appellants, the General Council of the Bar (England), to the respondents, the Commissioners of Inland Revenue, under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the respondents as to the stamp duty with which the instruments were chargeable.

No. 1 was an ordinary indorsement on a brief delivered to a King's Counsel, which indorsement stated the amount of the fee to counsel to appear on the hearing of an action, of a fee for consultation, and of a special fee respectively, the total amount of fees appearing on the indorsement amounting to upwards of 2*l.* The initials of the counsel were placed by him against the figures shewing the total amount of the fees appearing upon the indorsement after payment thereof, and before returning the brief to the solicitors who delivered it, the initials being intended as an indication that the solicitors instructing the counsel had paid to him the total amount of the fees. No. 2 was an ordinary statement of fees of a junior counsel amounting to upwards of 2*l.*, and was signed with the full name of the counsel, the signature being given after payment, and before returning the statement to the solicitors who paid the fees, the object of the signature being the same as that specified with reference to instrument No. 1. The several fees were marked

and paid in accordance with the ordinary practice as between counsel and a solicitor instructing him.

The respondents, being of opinion that both the instruments were receipts within the meaning of the heading "receipt" in the First Schedule to the Stamp Act, 1891 (1), severally assessed them as liable to the duty of a penny each, and that duty was duly paid and impressed.

The question for the opinion of the Court was whether the instruments were respectively liable to the duty assessed by the respondents.

Pickford, K.C., and *A. M. Bremner*, for the appellants. Sect. 101, sub-s. 1, of the Stamp Act, 1891, does not apply to

(1) Stamp Act, 1891, s. 1: "From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the first schedule to this Act shall be the several duties in the said schedule specified, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by this Act, and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force."

Sect. 101, sub-s. 1: "For the purposes of this Act the expression 'receipt' includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Sub-sect. 2: "The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands."

Sect. 103: "If any person—

"(1) Gives a receipt liable to duty and not duly stamped; or (2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or (3) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds."

"FIRST SCHEDULE

"*Stamp Duties on Instruments.*

	£	s.	d.
"RECEIPT given for, or upon the payment of, money amounting to 2*l.* or upwards . . .	0	0	1"

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

receipts for voluntary payments. If it did it would follow that if a father sent 2*l.* to his boy at school, and the boy wrote a letter saying he had received it and expressed his thanks, but did not place a penny stamp on the letter, the boy would be liable to a penalty of 10*l.* under s. 103 of the Act. A letter acknowledging a charitable contribution, or a donation to a clergyman's clothing fund of 2*l.* or upwards would also require a penny stamp. But even if the section does extend to some receipts given for voluntary payments, there are special circumstances connected with the voucher of counsel, the circumstances and the manner in which it is given, which make it not a memorandum or an acknowledgment of the receipt of money, but merely a document which is given to the solicitor who is an officer of the Court for the purpose of his producing it if he has occasion to do so to another officer of the Court, namely, the taxing Master. It is not intended to be, and is not, a receipt in the ordinary sense of the word.

Sect. 101 of the Stamp Act, 1891, is identical with s. 120 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), with the exception that in s. 120 of the Act of 1870 there is after "note, memorandum, or writing," the word "whatsoever." Therefore for thirty-six years it has been assumed that these documents are not liable to stamp duty. Until 1871 the statute in force was the Stamp Act, 1815 (55 Geo. 3, c. 184). Under Part I. of the schedule to that Act a "receipt" was chargeable, and the term included "any note, memorandum, or writing . . . . whereby any sum of money . . . . amounting to two pounds or upwards . . . . shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied." Some limitation must be placed upon the words "acknowledged or expressed to have been received or deposited or paid" in s. 101 of the Stamp Act 1891, otherwise they would include almost everything, e.g., a memorandum made by a person in his own notebook that another person had paid him 5*l.* That memorandum, if not an acknowledgment, would be a memorandum by which money was expressed to have been received. Again, many orders of the Court are drawn up which recite that a certain amount of money has been paid or received, and then go on in

the operative part to say that a balance is due. Those would be within the general words of s. 101 of the Act of 1891, if some limitation is not put upon them, although it cannot be said that they are receipts. With regard to the nature of counsel's fees, in *Kennedy* v. *Broun* (1), Erle C.J. said: "We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." That was approved by the Court of Appeal in *In re Le Brasseur and Oakley.* (2)

The decisions in those cases shew that counsel's fees are an absolutely voluntary payment; there is no obligation to pay them, and there are no means of recovering them if they are not paid; therefore they are just as voluntary as a payment of money made to a boy at school, or any voluntary contribution to a charity. In *In re Beavan* (3) it was held that under the Stamp Act, 1853 (16 & 17 Vict. c. 59), it was not necessary to affix the penny receipt stamp on a brief where counsel signs his name acknowledging the payment of the fee. That is a direct authority shewing that a limitation was placed upon the generality of the words in the Stamp Acts, 1815 and 1853, because if they had been construed in their widest literal sense they would have included counsel's fees which clearly might have been said to have been "paid," although they were not paid in discharge of an obligation. The ground of the decision in *In re Beavan* (3) was that the words "paid" in the Stamp Act, 1815, and "payment" in the Stamp Act, 1853, imported the discharge of an obligation, and there being on the facts no discharge of an obligation, the payment was not within the statutes. The same limitation must be placed upon the words "paid" and "payment" which respectively occur in s. 101, sub-s. 1, and s. 103, sub-s. 3, of the Stamp Act, 1891. The judgment of Lord Trayner in *Day* v. *Glaister* (4) shews that the words of s. 101 of the Stamp Act, 1891, although wide, are "capable of construction," i.e.,

(1) (1863) 13 C. B. (N.S.) 677.
(2) [1896] 2 Ch. 487.
(3) (1854) 23 L. J. (Ch.) 536.
(4) (1900) 2 F. 963.

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

that some limitation must be put upon them. The judgment shews that the document must be a receipt for a payment which imports an obligation. The payment must either create or discharge an obligation; and the word "received" in s. 101 of the Act of 1891 must be read in that limited sense. The judgment of Lord Russell of Killowen C.J. in *Attorney-General* v. *Carlton Bank* (1) also shews that a limitation must be placed upon the words in the Stamp Act, 1891. The history of the Act of 1891 is important. In *Tomkins* v. *Ashby* (2), *Mullett* v. *Huchison* (3), *Carey* v. *Eccleston* (4), and *Levy* v. *Alexander* (5) various documents were held not to be receipts within the meaning of the Stamp Act, 1815, inasmuch as they were not acknowledgments of money "paid." The intention of the Legislature was to include in the Stamp Act, 1891, documents which had by those and other decisions been held not to be receipts within the meaning of the Stamp Act, 1815, and accordingly in s. 101 of the Act of 1891 the words "received or deposited" were added. It is clear that the word "deposited" does not apply to the present case. The word "received" was added to meet the case where a payment created an obligation upon the person receiving the money to apply it in a way indicated by the person paying it, but where there was no obligation to return it to the payer, and the word "deposit" was therefore inapplicable.

Boyle v. *Brandon* (6) shews that the Stamp Act, 1815, did not apply to gratuities, and there is no sufficient indication of intention that they should be brought within the scope of the Stamp Act, 1891.

Sect. 101, sub-s. 1, of the Stamp Act, 1891, has two branches. The first part of the section refers to a payment of money; the second to the satisfaction of a debt or demand otherwise than by payment of money. The whole of the section deals with a debt or demand. The words "debt or demand" are used in the second part of the section and not in the first, because a settlement, satisfaction or discharge might take place otherwise than by payment of money. If that is not the meaning of the second

(1) [1899] 2 Q. B. 158.
(2) (1827) 6 B. & C. 541.
(3) (1828) 7 B. & C. 639.
(4) (1834) Craw. & D. (N.C.) 6.
(5) (1849) 4 Ex. 485.
(6) (1845) 13 M. & W. 738.

part of the section it would be quite unnecessary. The word "money" in the first part of the section refers to money received in discharge of a debt or demand. Remembering that the Stamp Act, 1891, was a statute amending the Stamp Act, 1815, which did not apply to gratuities, some very strong reason or some express language of a clear nature would be necessary to justify the Court in coming to the conclusion that s. 101 of the Act of 1891 deals with gratuities. The natural construction is to read the whole of the section as referring to the same thing, viz., a debt or demand. It seems very improbable that the Legislature should have intended that a letter acknowledging Easter offerings should be the subject of contribution to the revenue when the Easter offerings are not subject to income tax. Even if s. 101 of the Stamp Act, 1891, does apply to some receipts for gratuitous payments, it does not apply to the signature of counsel. The initials of counsel written on the brief do not of themselves mean anything. They do not express or acknowledge anything. To persons who know the ways of solicitors and counsel they express no doubt that the money has been received, but of themselves they do not express anything except that counsel who is designated by those initials has put his initials upon the brief. That might be done to signify that the fee was such as satisfied him, or for any other purpose.

If a taxing Master has to deal with a solicitor's bill, he is required by Order LXV., r. 27, sub-r. 52, to have counsel's voucher. That rule only expresses the practice that had obtained generally. The receipt to the solicitor is quite useless as a receipt. There is no obligation upon him to pay the money. The words "any such acknowledgment" at the end of sub-s. 1 of s. 101 of the Stamp Act, 1891, refer only to the case where a debt or demand is acknowledged to have been satisfied under the second part of the sub-section. If it referred to money acknowledged to have been received under the first part of the section, the words would have been "any such acknowledgments" or "any such acknowledgments or expression." [*Coggs* v. *Bernard* (1) and *Reg.* v. *Overton* (2) were also referred to.]

(1) (1703) 2 Ld. Raym. 909; 1 Smith, L. Cas. (11th ed.) 173.

(2) (1854) 23 L. J. (M.C.) 29.

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

Sir J. Lawson Walton, A.-G., and *W. Finlay*, for the respondents. The question is whether on sound grounds any exception can be taken in regard to the documents by means of which an acknowledgment is in fact made of sums which have been given to counsel in recognition of services rendered. It must be admitted that the payment which is made to a barrister in return for his professional services is an honorarium which cannot be recovered in any Court of justice. But it is a payment which is made in recognition of services rendered, and the usual practice is for a document to be initialled or signed by a member of the Bar, which purports or is understood to record the fact that the payment of the sum due in respect of those services has been made. The mere consideration that a signature or initials alone are affixed is not conclusive as to the nature and purport of that document. It is read—and can only be read—as a recognition or an acknowledgment of the fact that the sum incurred has been paid. Even if it be granted that to the uninstructed person the initials would be mysterious, everyone in the profession with whom a member of the Bar is brought into contact understands perfectly well with what object that signature has been asked for and affixed. Therefore, it is idle to say that it is not meant to be an acknowledgment of the sum paid to counsel as an honorarium in respect of professional services which have been rendered to the client. The question is whether that is not a receipt within the heading "Receipt" in the First Schedule to the Stamp Act, 1891. The word "given," which occurs under the heading, undoubtedly imports a limitation. It shews that the document is asked for or required, and that it is handed over and parted with, for some purpose. That takes it out of the category of mere spontaneous correspondence or private memoranda and entries made in books kept by the person to whom payment has been made. It imports the notion that [illegible] part of the sec[illegible] satisfaction [illegible] or tacitly some memorandum has been asked for and has been given in response. Therefore, the words of the schedule mean that wherever a receipt is given—that is, given to some other person—for money amounting to 2*l.* or upwards, the tax shall be assessed. It is very difficult to say that a document which is meant to be an acknowledgment of an

honorarium does not fall within the term "receipt" in the schedule, if the acknowledgment is asked for and given in consequence. The words of s. 101 of the Stamp Act, 1891, are too clear to allow of their being set aside by any ingenious manipulation, and it is obvious that if the document in the present case be a note—and it clearly is a note or memorandum—which is either expressly or tacitly an acknowledgment for money received, it is within the definition of receipt, even although that money may have been received in respect of an honorarium and not in respect of any obligation enforceable in a Court of law. It is true that in the case of charities receipts of this kind might be given and required. For instance, supposing a person is charged by another person who puts a fund at his disposal with the obligation of expending a sum of money every year in various charities at his own discretion, and he sends money to different charities and asks for an acknowledgment. If the acknowledgment were given, it would be an acknowledgment in respect of money received. The test is whether the memorandum in the present case is required and given. Counsel would not sign an acknowledgment for their fees unless they were asked for it. Therefore counsel is expressly or tacitly invited to give a receipt. It is a voucher which the solicitor may produce to the lay client to satisfy him that counsel has been paid. It is also useful on taxation of party and party costs, and in many cases which never go to taxation. It is the professional agent's voucher to his lay client that counsel employed have been paid their fees and have received the amount. It is also in many cases exceedingly important as between the London agent and the country solicitor, and is constantly used in that way in order that the London agent may vouch his disbursements. It is therefore impossible to say that in the popular acceptation of the term these documents are other than receipts which are given in the ordinary course of business. They are used as receipts irrespective of the consideration that the initial obligation rests on the honorarium and not on a legal enforceable debt. Sect. 101 of the Stamp Act, 1891, which is a new provision, appears to be framed with the express view of covering a larger field than the former statutes. In that section the

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

word "receipt" is to include three classes of documents, viz.: (1.) "any . . . . memorandum or writing whereby any money . . . . is acknowledged . . . . to have been received," or (2.) acknowledged "to have been . . . . deposited," or (3.) acknowledged "to have been . . . . paid." It was intended by the use of those three expressions to include three classes of documents, viz.: where the acknowledgment is of a receipt of money without any obligation attached to it, or of a receipt of money on the understanding that it has been deposited and that therefore there is an obligation to refund it, or that money has been paid and therefore is a liquidation of an obligation already incurred. The three words "received," "deposited," and "paid" are not to be taken to cut down each other, but are each to have a full meaning given to them. Three distinct classes are therefore included. The words "or deposited or paid" shew that the word "received" is to be enlarged, not to be cut down. These expressions are used in order to make the classification as wide as possible. It is not necessary to contend that all documents written with reference to money which has been received are taxable. For instance, if a person wrote a letter saying, "I am much obliged to you for your kind present," that would probably not be a receipt. Its function would not be that of a receipt. It would not be either invited or given as a receipt. For the purposes of this case it may be conceded that a receipt must mean a note or memorandum which is given as a receipt, which is meant to be an acknowledgment. If it were simply a friendly letter, the fact that it recorded some gratuity would not make it a receipt. It would be a misnomer to describe the document as a receipt. But it would not be, in popular language, a misnomer where a barrister sends in an account of fees and afterwards places his initials at the foot of it to say he has given an acknowledgment that he has been paid those fees. The initials are placed there for that purpose, and the document is therefore distinguishable from one containing a mere recognition of some gratuity, and which is not meant to operate as any voucher or acknowledgment to be used by the person to whom it is given. But if a father allowed his son 500*l.* a year and sent him sums from time to time on account, it being arranged that the son should

acknowledge those payments in respect of the allowance, the mere fact that it was a voluntary allowance would not prevent the acknowledgments of the payments being receipts. They would be intended to be receipts, so that the father could produce them at any time. If a document is asked for as a receipt and is sent for that purpose, and so used, and operates, it is a receipt within the meaning of s. 101 of the Stamp Act, 1891. Among the exemptions under the head "Receipt" in the first schedule to the Act of 1891 is, "(6.) Receipt given by any officer, seaman, marine, or soldier. . . ." Officers, seamen, marines, and soldiers cannot sue for their pay or wages, which are honoraria, yet they are expressly exempted from taxation. The fact that it was necessary to insert the exemption shews that without it the receipts given for wages and pay would have been subject to the stamp duty under the statute.

Bremner, in reply. These documents are entirely outside the meaning of sub-s. 1 of s. 101 of the Stamp Act, 1891. The sub-section contains two distinct branches. The first branch deals only with the case where money is received, deposited, or paid under such circumstances that the recipient, depositee, or payee comes under an obligation; the second branch deals with the case where an obligation is extinguished. The word "received" in the first branch of the sub-section covers all documents whereby money is expressed to be received, the recipient coming under an obligation. The present case is therefore entirely outside the first branch of the sub-section, and it is not contended on behalf of the respondents that it is within the second branch. It is therefore not within the sub-section at all.

[The Forgery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 66), s. 10, was also referred to.]

Cur. adv. vult.

Dec. 18. The following judgment was read by

BRAY J. The question raised in this case may be stated very shortly. It is whether when counsel, after payment of a fee of 2*l.* or upwards, places his initials or name against the fee on his brief or at the foot of a statement of fees the document is liable to stamp duty as a receipt. It is an important question, because, though the

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

Bray J.

amount of duty which the Crown would receive from such receipts is comparatively small, it is said that it would cause a good deal of inconvenience, and it involves a construction of the Stamp Act, 1891, which might make all receipts for voluntary payments liable to duty. The schedule to the Stamp Act, 1891, specifies the instruments on which duties are payable, and in that schedule are to be found these words: "Receipt given for, or upon the payment of, money amounting to 2*l.* or upwards." The expression "receipt" is defined by s. 101, sub-s. 1, as including any note, memorandum, or writing, whereby any money amounting to 2*l.* or upwards, or any bill of exchange or promissory note for money amounting to 2*l.* or upwards, is acknowledged or expressed to have been received or deposited or paid. I omit for the present the rest of the section. The contention of the Crown is, that the documents which I have described, and of which illustrations are given in the case, are acknowledgments that money—i.e., the fee or fees—has been received. The appellants contend that they are not acknowledgments at all, and that, if they are, they are not acknowledgments of money received within the meaning of s. 101, sub-s. 1. I will deal with the first point first. Are they acknowledgments at all? I do not feel any difficulty on this point. It is to be observed that the latter part of s. 101, sub-s. 1, says: "or which signifies or imports any such acknowledgment." Mr. Pickford contended, on behalf of the appellants, that these words do not apply to the first branch of the section, namely, acknowledgments of money received. I do not agree with that contention; I think they apply to both parts of the section. They do not, however, substantially extend the word "acknowledgment," because, if the writing signifies or imports an acknowledgment, I think it is an acknowledgment. Probably these words were put in to make it clear that it is not necessary that the word "acknowledgment" or any equivalent word should have been used. Now, what does counsel put his initials or name opposite the fee for? He does so because he is asked by the solicitor to do so, in order that the solicitor may satisfactorily prove to the taxing Master, or to his client, or to the Court, or perhaps to the Law Society, that he has paid the fees. He, in effect, asks the counsel to acknowledge payment of

the fees. Order LXV., r. 27 (52), says that no fee to counsel shall be allowed (by the taxing Master) unless vouched by his signature. It is a voucher. What is a voucher but an acknowledgment that money has been received? I think that the decision of Lord Russell of Killowen C.J. in *Attorney-General* v. *Carlton Bank* (1) supports this view. He held there that the placing of his initials by an officer of the bank to entries of moneys in a book were acknowledgments by the officer that he had received the moneys, although in some of the documents no word "received" was put, nor anything beyond the initials and date. It was further argued in this case that it was not really an acknowledgment, but a document only intended to be shewn by one officer of the Court—i.e., the solicitor—to another officer of the Court—namely, a taxing master. I do not think that is correct, because the solicitor might often use it to satisfy his client, or, if he brought an action, to satisfy a judge or jury, that he had paid the fee on his bill of costs. Probably only a small proportion of bills of costs ever goes before the taxing Master at all. But, if it were intended for this purpose only, I do not see that that alters the nature of the document. It is still an acknowledgment of money received. I come therefore to the more difficult question. Assuming this to be an acknowledgment, is it an acknowledgment of a sum of money received within s. 101, sub-s. 1? The argument of the appellants is, shortly, this. They say, the words are very wide, they must have some limitation, and it would be reasonable to limit them to cases where the receipt of the money has relation to a legal obligation—i.e., either creating or discharging an obligation—and that counsel's fee is an honorarium paid without any legal obligation. There is no doubt that counsel's fee is paid without any legal obligation. If authority for this is required it is to be found in *In re Le Brasseur and Oakley* (2), where it is expressly laid down by Lord Lindley that, if the counsel does not choose to require payment with the brief, payment becomes a matter of honour, not of legal obligation. I have, therefore, to say whether the section does apply to a receipt of money where no legal obligation is discharged or created. The appellants asked me first to

(1) [1899] 2 Q. B. 158. (2) [1896] 2 Ch. 487.

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

Bray J.

consider the previous legislation, especially the Stamp Act, 1815 (55 Geo. 3, c. 184), and the decisions on that Act. The Stamp Act, 1891, so far as the definition of a receipt is concerned, is a re-enactment of the Act of 1870, but the language of the Act of 1815 is different. It is in these words: "And any note, memorandum or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt or demand, or any part of any debt or demand therein specified, and amounting to 2*l.* or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money of equal amount with the sum, debt or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged. . . . ." In the case of *Tomkins* v. *Ashby* (1), the Court held that a document in these words, "September 25, 1824, Mr. Tomkins has left in my hands 200*l.*" was not a receipt liable to duty, and Lord Tenterden said, in giving the judgment of the Court: "I am of opinion that a stamp was not necessary in this case. Acts of Parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature. Looking at the schedule of the 55 Geo. 3, c. 184, we find a duty imposed upon every 'receipt or discharge given for or upon the payment of money.' Then there is a declaration that 'any note or memorandum given to any person upon payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand therein specified, and amounting to 2*l.* and upwards, shall be acknowledged to have been paid, settled, balanced, or otherwise discharged, shall be deemed a receipt.' All these words import that something formerly due has been discharged. I think, therefore, that the memorandum in question is not within the Act, and does not stand in need of any exception." The ground, therefore, of this decision was that all the words, including the word "paid," imported the discharge of an obligation, and that

(1) 6 B. & C. 541.

the Act did not include in its definition of the word "receipt" an acknowledgment that money had been deposited to be accounted for. Other decisions followed, and amongst them there was the case of *In re Beavan* (1), where Knight Bruce and Turner L.JJ. held that the receipt given by a counsel for his fees was not liable to stamp duty, but no reasons were given. I do not consider that these cases give me much assistance in construing the Act of 1891. Undoubtedly under the Act of 1815 the acknowledgments given by counsel were not liable to stamp duty, because it was held that a receipt to be within that Act must have been given in discharge of a debt antecedently due; but s. 101, sub-s. 1, of the Act of 1891 is differently constructed, and contains additional words, and particularly the word "received," and was obviously intended to include cases which were not within the previous statute, and the only way to see what cases are included is to consider the language used. In some cases there has been some incident immediately preceding the passing of the Act which might serve as a guide as to what the intention was. Here there was nothing of that kind. The Stamp Act, 1870, which introduced the change, was a general revision of the stamp laws, which takes place periodically with a view to amendment and consolidation. I proceed, therefore, to examine the language. Now, that the words are wide enough to include the present case I cannot doubt. A counsel's fee is within the words "any money," and as I have held that the writing is an acknowledgment, it seems to me that it is an acknowledgment of money received if the word "received" is construed according to its natural meaning. Now why should I give the word a limited meaning? Lord Russell of Killowen C.J., in *Attorney-General* v. *Carlton Bank* (2), does not apparently agree with the statement of Lord Tenterden that Acts of Parliament imposing duties are so to be construed as not to make any instrument liable to them unless manifestly within the intention of the Legislature, but it is not necessary for me to say which is right, because I think the natural meaning is the manifest meaning unless there is something to shew that it is not. It was argued that some limitation must be placed on the words, otherwise they would include a

(1) 23 L. J. (Ch.) 536. (2) [1899] 2 Q. B. 158.

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

Bray J.

note or memorandum made by a man in his own book. This case, however, is clearly excluded, because the schedule says "receipt given." That means it must be a document given by the person receiving the money to some other person, presumably to the person who has paid. It might be right, perhaps, to read in the words "as a receipt" after the word "given," but that will not help the appellants, because, as I have already stated, I think the documents in this case were given for the purpose of recording the fact that the fees had been paid. Then it was argued on behalf of the appellants that the word "received" must be read as connoting an obligation created or discharged, because the words "deposited or paid" in the same part of the section connote such an obligation. I do not see that. The Legislature has used, in addition to the words "deposited or paid," a word "received," which in my opinion does not, according to its natural construction, connote an obligation. Prima facie it has chosen that word intentionally, and I do not think I ought to construe it as connoting an obligation created or discharged unless there is some manifest reason for doing so. Is there such a reason? It is said that if I do not so construe it it will make all receipts for charitable gifts and subscriptions and for presents liable to duty. I am inclined to think that is so if the documents are given as receipts, but the person making the gift or sending the subscription need not require a receipt, and in the case of a present rarely does so. If he does so it must be because he looks upon the transaction for some reason as a business transaction, it might be because he has to account to some one else, and he wants a voucher, i.e., a business document. If so, I do not see why the Legislature should not have intended to make these documents liable to stamp duty, like a very large number of other business documents which are included in the schedule. An agreement with, or a lease to, a charitable institution is liable to stamp duty, like any other agreement or lease, and why should not a receipt be? It is said that it would include the case of a boy at school writing to thank his parents for sending him money, if it amounted to 2*l.* or upwards. I think the Attorney-General's answer is sound, that if the letter is written as a record of the receipt of the money it ought to bear

duty, otherwise probably not, because such a letter as a rule would not be intended as a receipt. However, it is unsafe to give much consideration to such extreme cases. It was pressed upon me that, although this enactment passed as long ago as 1870, there had been for more than thirty years no attempt to enforce it in reference to receipts for counsel's fees. No doubt that should make one look carefully at the language of the Act, but there may have been many reasons why this delay should have taken place. I confess to have been a little surprised that the present proceedings should have been taken now. It is clear that the doctrine of contemporaneous exposition does not apply to a case like the present. No authority of any value upon the construction of the statute was quoted to me, except the case of *Day* v. *Glaister* (1), decided in 1900, and reliance was placed on these words in Lord Trayner's judgment: "The terms in which the Stamp Act defines or describes a receipt are very broad and comprehensive. But they are open to construction and may from the context admit of qualification. When the statute says that a 'receipt' shall include 'any note, memorandum, or writing' whereby any sum of money amounting to 2*l.* or upwards 'is acknowledged or expressed to have been received, or deposited, or paid,' it is obvious that the language is capable of covering more than it was intended to express. For, if taken literally, it would cover and include any note or memorandum which a man might make in his own books acknowledging the receipt of 2*l.* or upwards from another." It is plain that the attention of Lord Trayner was not called to the words of the schedule "receipt given." Then he goes on: "It appears to me that what the statute provides for is limited to any note, memorandum, or writing given by one person to another, to be retained by the recipient as his voucher, either of the discharge of a payment made, as in the ordinary case of payment of a debt, or acknowledgment of an obligation undertaken in respect of the receipt of money as in a deposit." The first part of this passage, "given by one person to another to be retained by the recipient as his voucher," I entirely agree with, and it is all that was necessary for the decision of that case, and if Lord Trayner's

(1) 2 F. 963, at p. 966.

1906

GENERAL COUNCIL OF THE BAR (ENGLAND) v. INLAND REVENUE COMMISSIONERS.

Bray J.

attention had been called to the words of the schedule "receipt given" it may be he would not have added the latter words. There was no question in that case of the absence of an obligation undertaken or discharged, and I do not think Lord Trayner had in his mind a voluntary payment, or really intended to exclude it. If he did I am afraid I cannot agree with him. On the whole, it seems to me that I am bound to give the words "any money acknowledged to have been received" their natural meaning, and that according to their natural construction they include the present case. My judgment, therefore, must be for the Crown.

Appeal dismissed.

Solicitors for appellants: *Gribble, Oddie, Sinclair & Johnson.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. E. A.

C. A.

1906

Dec. 6, 13.

[IN THE COURT OF APPEAL.]

In re A BANKRUPTCY NOTICE.

Bankruptcy Notice—Final Judgment—Enforcing Award—Entering Judgment in accordance with Award—Jurisdiction—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 12—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A judgment obtained in pursuance of an order purporting to be made under the Arbitration Act, 1889, to enforce an award on a submission by entering judgment in accordance therewith, is not a final judgment in an action upon which a bankruptcy notice can be founded within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

Per Vaughan Williams and Fletcher Moulton L.JJ.: The Court has no jurisdiction under s. 12 of the Arbitration Act, 1889, which provides for the enforcement of an award on a submission in the same manner as if it were a judgment, to order judgment to be entered in accordance with the award.

Per Fletcher Moulton L.J.: An application for a bankruptcy notice is not a method of enforcing an award within s. 12 of the Arbitration Act, 1889.

APPEAL from the refusal of one of the registrars to issue a bankruptcy notice.

C. A. 1906

A BANKRUPTCY NOTICE, *In re.*

In 1905 the creditor and the debtor referred certain differences to arbitration in pursuance of a provision in that behalf in a deed of partnership.

On March 5, 1906, the umpire appointed in the arbitration made his award, whereby he awarded and directed that each of the parties should pay one-half of the costs of the award, which he assessed at 57*l.*

On August 2, 1906, the creditor took out an originating summons in the King's Bench Division, under Order LIV., r. 4F, intituled in the matter of the arbitration and in the matter of the Arbitration Act, 1889, asking that the award might be enforced as a judgment of the Court.

By an order dated August 10, 1906, intituled in the same matters, the Master ordered that the award be enforced "and that judgment be entered in accordance therewith," and that the taxed costs of the application be paid by the debtor.

By a judgment dated September 11, 1906, intituled in the same matters and expressed to be made pursuant to the order of August 10, 1906, "whereby it was ordered that the award of the umpire in the above arbitration dated 5th March, 1906, be enforced, and that judgment be entered in accordance therewith," and that the taxed costs of the application should be paid to the creditor, it was adjudged that the creditor recover against the debtor 28*l.* 10*s.* and the costs of the application.

The creditor thereupon applied to the registrar to issue a bankruptcy notice, and produced a copy of the judgment. The registrar refused the application, on the ground that the judgment was not a final judgment in an action within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

The creditor appealed.

Harold Simmons, for the creditor. The request to issue a bankruptcy notice shews that everything is in order, and if the applicant produces the judgment on which the request is founded he gets leave as a matter of course: see Bankruptcy Rules, 1886 to 1890, r. 137, and Form 5 in the Appendix. Where an application is made for leave to enforce an award under s. 12 of the Arbitration Act, 1889, the practice is to issue an originating

C. A. 1906

A Bankruptcy Notice, *In re.*

summons intituled in the matter of the arbitration and in the matter of the Arbitration Act, 1889, and the summons may either ask for leave to enforce the award by entering judgment in accordance therewith, or for leave to enforce the award in the same manner as a judgment or order to the same effect: Annual Practice, 1907, vol. 2, p. 607. Here the creditor has chosen the former alternative and has obtained what purports to be a final judgment, and the only question is whether it is a final judgment in an action. By s. 100 of the Judicature Act, 1873, "action" is defined as "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." It is submitted that the proceeding to enforce an award is an action within that definition.

[Vaughan Williams L.J. It must be a final judgment in an action within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.]

The meaning of "action" in that sub-section is defined in *Ex parte Chinery* (1) and in *In re Binstead.* (2)

[Fletcher Moulton L.J. referred to *Ex parte Caucasian Trading Corporation.* (3)

Edward Clayton, amicus curiæ, referred to *In re Lynes.* (4)]

Further, upon the true construction of the sub-section, any final judgment is sufficient to found a bankruptcy notice upon, whether obtained in an action or not.

[Fletcher Moulton L.J. In my opinion s. 12 of the Arbitration Act does not give the Court jurisdiction to enter judgment in accordance with the award, and this judgment was bad for want of jurisdiction.]

The question of jurisdiction will not be entertained upon an application to the registrar to issue a bankruptcy notice.

Vaughan Williams L.J. I think that the decision of the learned registrar was right. I will begin by saying that there are several authorities in which it has been laid down that s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, ought to be construed strictly, and ought not to be held applicable except in a case which is manifestly within the words of the clause. The

(1) (1884) 12 Q. B. D. 342.
(2) [1893] 1 Q. B. 199.
(3) [1896] 1 Q. B. 368.
(4) [1893] 2 Q. B. 113.

appellant asked that a bankruptcy notice might be issued upon a judgment which was based upon an order to enforce an award. The judgment was intituled in the matter of the arbitration and in the matter of the Arbitration Act, 1889, and it provided as follows. [The Lord Justice read the judgment.] The registrar refused to allow the bankruptcy notice to issue. I think that that refusal was right, in the first place, for the reasons given by the registrar; but further, in my opinion, this judgment does not really fall within s. 4, sub-s. 1 (*g*), at all. It purports to be based upon s. 12 of the Arbitration Act, 1889, which provides that "an award on a submission may by leave of the Court or a judge be enforced in the same manner as a judgment or order to the same effect." It does not seem to me that the words of s. 12 have the same effect as the words of the section which deals with the case of a reference of an action for trial under an order of the Court. It does not seem to me that the effect of those words is at all equivalent to r. 50 of Order xxxvi., which provides that "the referee shall have the same powers to direct that judgment be entered for any or either party as a judge of the High Court." All that is done by s. 12 is to give to the successful party under the award the right to enforce it as if it were a judgment. I have grave doubts whether there was any jurisdiction to enter judgment in this case; but, assuming that there was jurisdiction, I think that this case does not fall within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act. I am therefore of opinion that this appeal fails.

FLETCHER MOULTON L.J. I am of the same opinion. In order to avail himself of the procedure of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, the creditor must have obtained a final judgment, and in this case a document was presented by the creditor applying for the bankruptcy notice, which purported to be a final judgment of the High Court, inasmuch as it recited an order whereby it was ordered that the award be enforced and that judgment be entered in accordance therewith, and adjudged that the creditor do recover against the debtor 28*l.* 10*s.* and costs.

But in my opinion that document was bad on the face of it. It was entitled in the matter of the Arbitration Act, 1889, and

C. A. 1906

A BANKRUPTCY NOTICE, *In re.*

Fletcher Moulton L.J.

in the matter of a certain arbitration. It was, therefore, clear that the arbitration to which it referred was not an arbitration in an action, but was an arbitration outside the Court altogether. The powers of the Court as to giving effect to such an award in such an arbitration are defined by s. 12 of the Arbitration Act, 1889. That section provides that "an award on a submission may by leave of the Court or a judge be enforced in the same manner as a judgment or order to the same effect." But it gives no power to turn such an award into a judgment. It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, viz., an award. Therefore, in my opinion, the insertion in the Order of the direction that judgment should be entered (which turned this order into a final judgment) was without jurisdiction.

The only other question is as to whether the procedure under s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, is an enforcement within the meaning of s. 12 of the Arbitration Act, 1889. In my judgment an application for a bankruptcy notice is not a method of enforcing a judgment. It is the commencement of proceedings of far wider effect, and is not intended to be included in the words of s. 12 of the Arbitration Act. Therefore, this order, even if we corrected it by striking out the words inserted without jurisdiction, would not entitle the creditor to the issue of a bankruptcy notice.

BUCKLEY L.J. I am of the same opinion. Whatever may be the effect of the Master's order of August 10, and the so-called judgment of September 11 which was drawn up on that order, in my opinion, this judgment did not constitute a final judgment within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

Appeal dismissed.

Solicitors: *Windybank, Samuell & Lawrence.*

H. B. H.

DE LA BERE *v.* PEARSON, LIMITED.

1907
Jan. 16, 24.

Contract—Consideration—Breach of Duty to take care—Damages—Remoteness—Intervening Criminal Act of Third Party causing Loss.

The defendants, newspaper proprietors, advertised in their newspaper that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff, a reader of the paper, wrote to the defendants' city editor asking him to recommend a "good stockbroker." The editor recommended one T., who, as he well knew, was an "outside broker," that is to say a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. T. had for some months been employed by the defendants' editor to advise him on matters connected with the financial correspondence in his newspaper, and there was no evidence that the editor had any reason to suspect T.'s honesty. T. was, in fact, an undischarged bankrupt, but that fact was unknown to the editor, though he might easily have ascertained T.'s financial position if he had made inquiries. The plaintiff, in reliance on the editor's recommendation, sent money for investment to T., who immediately misappropriated it to his own use:—

Held: 1. That there was a contractual duty upon the defendants and their editor to take care that the person recommended as a broker to the plaintiff should answer the description of a good stockbroker, and that the editor in recommending T. had committed a breach of that duty;

2. That T.'s misappropriation of the money, even if it amounted to a criminal offence, did not prevent the editor's breach of duty from being the cause of the plaintiff's loss, and that the defendants were liable to recoup that loss to the plaintiff.

Appeal (1908) 1 KB 281

TRIAL before Lord Alverstone C.J., without a jury.

The following statement of the facts is taken from the judgment of the Lord Chief Justice:—

The defendants are the proprietors of a paper called *M.A.P.* This paper, which has a very considerable circulation, has for many years been in the habit of publishing in each issue paragraphs under the head of "M.A.P. in the City," followed by the words "Spare Cash and Advice.—Readers of *M.A.P.* desiring financial advice in these columns should address their queries (with full name and address) to the City Editor, 17, Henrietta Street, Covent Garden, W.C." The plaintiff, who was a reader of the paper, and had, according to his evidence, been in the habit of reading it for a considerable time, wrote to the city editor a letter in the following terms:—"Bishop's Stortford,

1907

DE LA BERE v. PEARSON, LIMITED.

March 6, 1905. Dear Sir,—I should feel greatly obliged if you will kindly advise me how I can best invest 800*l.* in two or three fairly safe securities to pay not less than 5 per cent. I see in your last issue you recommend Chelsea Electric, which pays nearly 5. Can you suggest any other better than this, some home industries? and oblige, Yours faithfully, K. B. Baghot de la Bere. Please also name good stockbroker. If you only reply in *M.A.P.*, please do so under 'Rex,' not my full name." This letter was handed by the city editor to a person of the name of Thompson, who traded as an outside broker under the name H. Hughes & Co. at 16, Royal Exchange, and who on March 20 wrote to the plaintiff in the following terms:—"Dear Sir,—The editor of *M.A.P.* regrets that his reply to yours of the 6th inst. has been crowded out of the paper, and so requests us to write to you. We may state that we transact most of his business for him, and upon his recommendation shall be very pleased to do what we can in your interests.—Yours truly, H. Hughes & Co." The plaintiff replied to this letter, but his reply has not been preserved, and he kept no copy. On March 24 Thompson, under the name of Hughes & Co., wrote the following letter: "Dear Sir,—We are in receipt of yours of yesterday's date and thank you We do not think you could have a much better list than that sent you the other day; there were nine different shares mentioned, and if you were to buy twenty-five Aux Classes Laborieuses, and twenty-five Waring & Gillow, and 100 of each of the others the cost would work out at about 1100*l.* If you should then have any little sum over for speculative purposes you might put it into Nile River Syndicate, which we consider likely to go much higher in price. The present quotation is about 6*s.* 3*d.* Our rates of commission are just the same as with ordinary brokers, and may be reckoned as about threepence for every pound in value. . . . . You say in your letter that you wish to act quickly, and we should have bought for you to-day, but could not quite read your letter as a definite order. Perhaps you will let us have this in course, when we shall be pleased to do our best for you. Yours truly, H. Hughes & Co." On March 27 the plaintiff sent to Hughes & Co. at 16, Royal Exchange, two

cheques, one for 800*l.* and one for 500*l.*, which Thompson, under the name of Hughes & Co., acknowledged. On April 1 and April 8 Hughes & Co. sent to the plaintiff contract notes for the purchase of industrial securities of a total value of 1230*l.*, and on May 4 and May 8 further contracts for 114*l.* 11*s.* and 118*l.* 1*s.* respectively, and on May 5 the plaintiff sent to Hughes & Co. a further cheque for 100*l.* No complaint was made of the character of the shares in which Hughes & Co. had suggested that the plaintiff's money was to be invested; they had in fact been selected by the defendants' city editor. But Thompson was called as a witness and admitted that he had not bought any shares, and that the cheques for 800*l.* and 100*l.* were paid to his wife's account at Barclay's Bank, on which he was entitled to draw, and the cheque for 500*l.* was paid away to some stockbrokers to whom he owed money. Thompson was an undischarged bankrupt, and therefore could not be a member of the Stock Exchange. The evidence with regard to the employment of Thompson was as follows:—Mr. Horniman, the city editor of the defendants' paper, stated that he had been for six years up to July, 1905, financial editor of *M.A.P.*, and it was his duty to prepare the answers to correspondents, which answers were given either in the next or subsequent issues of the paper, or, not unfrequently, by direct communication. He stated that, as to a good many of the questions, he answered them himself, but as to a great many others he required advice; that in previous years he had consulted three separate firms of stockbrokers in succession, all of whom were members of the Stock Exchange and firms of repute. The terms arranged with those firms were that they should not receive any payment for such advice, but were to have the benefit of any introduction to clients who might be obtained through the columns of *M.A.P.* or by answers sent in reply to their questions. He stated that the three firms of stockbrokers got tired of doing this, as it involved a great deal of work and did not lead to their obtaining many clients. He added that his practice was to recommend anyone who asked for the name of a broker to the firm which was helping him. It was proved that Horniman had on several previous occasions recommended a firm of stockbrokers to correspondents, and given the

1907

DE LA BERE v. PEARSON, LIMITED.

names of the correspondents to the stockbrokers, with a view to their corresponding with them and so obtaining clients, as this was the only remuneration or reward which the brokers advising him obtained for their services. He stated that he had known Thompson very slightly since 1889, that he knew he was an outside broker trading under the name of Hughes & Co., and not a member of the Stock Exchange, and that for six months before March 4, 1905, Thompson had been advising him. He had shown him the letters upon which he required advice, and had not unfrequently handed to him letters that he might reply direct to correspondents, and he had told him that he would do what he could to help him, and that he should have any clients that could be obtained through the columns of the paper. He further stated that he did, as stated by Thompson in the letter of March 30, request Thompson to reply and recommend the plaintiff to him as a client. It was established that this was a part of the regular business of the city editor, and was a business of considerable dimensions, there being in many weeks a very large number of letters which required to be dealt with. Horniman stated that he knew the importance of a broker being a member of the Stock Exchange, but he did not know that Thompson was an undischarged bankrupt, but admitted that he could have ascertained his financial position without any difficulty had he made inquiries. It was established that on many previous occasions letters had been answered direct to other correspondents by the brokers advising Horniman, and that it appeared from the columns of the newspaper that correspondents were sometimes answered direct, and that it was the practice of the city editor to recommend firms of brokers. Horniman was suspended from his position as editor in July, 1905, and on complaint being made by other correspondents who had employed them as brokers upon the recommendation of the city editor it was stated that the defendants had done what they could to get back for their correspondents the money owing from Hughes & Co., and that they had taken proceedings on behalf of several would-be investors to recover moneys paid by them to Hughes & Co. It was admitted by the defendants that it was part of the duty of the city editor to answer questions addressed to him, and

to recommend brokers. Upon these facts the plaintiff brought the action to recover damages as for breach of contract to exercise due care in giving financial advice to the plaintiff.

Spencer Bower, K.C., and *Boydell Houghton*, for the plaintiff. The advertisement in the defendants' paper, offering to give financial advice to readers of the paper who inquired of the editor, amounted to a promise that the editor would exercise due care and skill in the giving of such advice. In breach of that promise the defendants' editor recommended as a good stockbroker a person who he knew was not a stockbroker at all in the sense in which he ought to have realized that the plaintiff had used that term. Further, he was guilty of want of care in not making inquiries as to the broker's solvency. Had the plaintiff known that Thompson was an outside broker and an undischarged bankrupt, he would never have trusted him, and the loss would never have occurred.

[LORD ALVERSTONE C.J. I am quite clear that the defendants here were guilty of a breach of duty.]

McCall, K.C., *Rufus Isaacs*, K.C., *R. W. Turner*, and *Profumo*, for the defendants. Assuming that there was a breach of a contractual duty to take care that a broker who was recommended to the plaintiff was a member of the Stock Exchange, still the action will not lie for anything more than nominal damages. The loss of the money is too remote. There is no logical connection between the recommendation of an outside broker and the loss. There is no presumption of law that an outside broker will steal money intrusted to him for investment. If Horniman had recommended a broker who was a member of the Stock Exchange, and that broker had stolen the money, the position of the plaintiff would have been precisely the same, yet it is clear that no action would have lain. The loss was due to Thompson's crime, not to the defendants' breach of duty: *Baxendale* v. *Bennett* (1); *Scholfield* v. *Lord Londesborough*. (2) Horniman had no reason to anticipate that Thompson would commit a crime, and under those circumstances there was no negligent disregard of the plaintiff's interests in recommending Thompson's employment. The same objection that the

(1) (1878) 3 Q. B. D. 525. (2) [1896] A. C. 514.

1907

DE LA BERE v. PEARSON, LIMITED.

damage is too remote applies equally to the alleged want of care in not discovering that Thompson was an undischarged bankrupt. A bankrupt is not necessarily a dishonest person.

Bower, K.C., in reply.

Cur. adv. vult.

Jan. 24. LORD ALVERSTONE C.J. after stating the facts as above set out, proceeded as follows:—Upon these facts, which are not disputed, it was conceded by Mr. McCall, who appeared for the defendants, that there had been a breach of duty or contract on the part of Horniman, but he contended that damages could not be recovered on the ground that, as he argued, Thompson had been guilty of a criminal offence, and that but for the commission of that offence these damages would not have been sustained. He relied principally upon the judgments of Bramwell L.J. and Brett L.J. in *Baxendale* v. *Bennett*. (1) I think it is unnecessary to consider in detail any of the many authorities in which the question of remoteness of damage has been discussed, and without attempting to distinguish between the expressions causa causans, causa sine qua non, and causa proxima, the rule of law appears to me to be now well established, that if the defendants' breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may have contributed to the loss. In this case the defendants undertook to recommend a good stockbroker. By that I understand a man of repute and position who might safely be trusted with money to invest, quite apart from the advice which he would give with regard to the stocks in which the money was to be invested. It cannot, I think, be denied that had Horniman taken steps to inquire, or had realized the true position, he could not possibly have recommended Thompson or Hughes & Co. as such a man. The money, as soon as it was paid by the plaintiff to Thompson was applied by him entirely for his own purposes. It may be that in so doing Thompson was committing a criminal offence. This is not, in

(1) 3 Q. B. D. 525.

my opinion, sufficient to prevent the application of the principle to which I have referred, and, so far as it is a question of fact, I find as a fact that the defendants' negligence and breach of duty, in recommending Thompson to the plaintiff as a good stockbroker, was the primary and substantial cause of the plaintiff's loss of money. No other legal basis for assessment of damages has occurred to me, nor was it suggested in argument for the defendants, their counsel contending that the plaintiff was entitled to nominal damages only.

The observations of Bramwell L.J. and Brett L.J. in *Baxendale* v. *Bennett* (1), already cited, on which reliance was placed by the counsel for the defendants, do not in my opinion support their argument, because in that case it was held that the negligence of the defendant was not the proximate or effective cause of the fraud which caused the loss. I give judgment for the plaintiff for 1400*l*.

Judgment for the plaintiff.

Solicitors for plaintiff: *Walter Webb & Co.*
Solicitors for defendants: *Harrison & Davies.*

(1) 3 Q. B. D. 535.

J. F. C.

1906
Nov. 28.

[IN THE COURT OF APPEAL.]

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD, APPELLANTS; BENSTED (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Sewer—Vested in Local Authority—"Hereditament"—"Capable of actual Occupation"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60; *Sched. A, Rules No.* I., *No.* III.

A sewer vested in and under the control of a local authority, and of such a character that it is rateable to poor rate, is, for the purpose of income tax, chargeable in respect of the annual value thereof according to s. 60, Sched. A, Rule No. I. of the Income Tax Act, 1842, as a hereditament capable of actual occupation.

Judgment of Walton J., [1906] 1 K. B. 294, affirmed.

APPEAL from the judgment of Walton J. upon a case stated by Commissioners of Income Tax, and reported [1906] 1 K. B. 294.

The special case is set out in the report below, and the following summary of it is taken from the judgment of the learned judge. The appellants are the governing body of a united drainage district consisting of the urban district of Rhondda (formerly known as Ystradyfodwg) and the urban district of Pontypridd, constituted by virtue of a Provisional Order of the Local Government Board dated June 4, 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purpose of carrying into effect a system of sewerage for the use of those urban districts, and it was provided by art. 19 of the Order that all sewers made by the appellants should vest in and be under the control of the appellants. Pursuant to the powers vested in them by the Order the appellants designed and constructed, and have since always maintained, a sewer or sewage carrier for the use of the district, and have erected, maintained and worked such works, machinery, and plant as were required for conveying the sewage of the district to the sea. The total length of the sewer or sewage carrier is about seventeen and a quarter miles, whereof nearly two and a half miles passes through or over land situate in the parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) was

previously to the construction of the sewer or sewage carrier, and still is, rated and assessed for the relief of the poor. The construction of the sewer or sewage carrier within the parish of Rumney is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground; 1021 yards of pipes laid below the surface and ordinary level of the ground; 1890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height, which rises above the level of the adjacent land; and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. Under the Local Government Board's Provisional Orders Confirmaton (No. 8) Act, 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county borough or district to communicate with the sewer or sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had, previously to the date of the making of the assessment appealed against, been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation whereby sewage of certain parts of the districts under the control of those local bodies was to be received in, and carried away by, the sewer or sewage carrier of the appellants upon payment to the appellants by the local bodies of certain sums levied upon the respective rateable values of their districts. The assessment in question is for the year ending April 5, 1905, and the amount of the assessment is 800*l.* Although during the year in question the appellants received, in addition to what was levied in rates in their own district, sums amounting to 943*l.* 19*s.* 7*d.* from the Cardiff Corporation and the urban district councils which made use of the sewer under the Order of 1896, it was not disputed that they derived no profit from the use or working of their sewer or that part of it which is in the parish of Rumney. The appellants appealed against the assessment to the Commissioners for the general purposes of the Income Tax Acts for the district of Monmouth, who confirmed the assessment subject to a case.

C. A. 1906

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED.

On the argument of the case the learned judge confirmed the assessment and gave judgment for the respondent. (1)

The appellants appealed.

Danckwerts, K.C., and *S. T. Evans, K.C.* (with them *J. H. Redman*), for the appellants. The sewer in question is not assessable to income tax. The sewerage board derive no profit from it. The duty is imposed on them by the Public Health Act, 1875, of receiving the sewage of their district without charge. They cannot let the sewer, and the only income that they derive from it is from the contributions of the other authorities who are allowed to use it. Such a sewer stands in a wholly different position in relation to chargeability to income tax from that which it occupies in relation to rateability to poor rate. It was long ago held that an ordinary underground sewer belonging to a local authority was not rateable as not being the subject of beneficial occupation: *Reg.* v. *Metropolitan Board of Works* (2); *Metropolitan Board of Works* v. *West Ham Overseers.* (3) But a distinction has been drawn between such sewers and one like that in the present case, following on the decision in *Reg.* v. *School Board for London* (4), to the effect that the school board itself might be considered as a possible tenant of a school, and therefore that there was a rateable value to the extent of the rent which they might be expected to pay for such a school. It was held that the exception of underground sewers from poor rates was anomalous, and that on the principle of the school board case there is a beneficial occupation of sewers which occupy or affect the surface which made them rateable: *West Ham Churchwardens* v. *London County Council.* (5) That principle was applied to the case of this sewer in *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee.* (6) The same reasoning does not apply to the incidence of income tax. The basis of chargeability to income tax is not beneficial occupation, but profitable occupation. It is a tax upon a person's income or annual profits, as pointed

(1) [1906] 1 K. B. 294.
(2) (1868) L. R. 4 Q. B. 15.
(3) (1870) L. R. 6 Q. B. 193.
(4) (1886) 17 Q. B. D. 738.
(5) [1893] A. C. 562.
(6) [1901] 1 K. B. 406

out by Lord Davey in *London County Council* v. *Attorney-General* (1), and if there is no income or profit there is nothing to tax. The assessment, whether it is under Sched. A or Sched. D, is on profits; and under both schedules substantially the same mode of arriving at profits is to be applied: *Alianza Co.* v. *Bell.* (2) In order to give rise to chargeability under Sched. A there must be actual occupation of the hereditament, and that occupation must be profitable and not merely beneficial. By the terms of Sched. A, Rule No. I., which is the "General Rule for estimating lands, tenements, hereditaments, or heritages mentioned in Schedule (A)," the rule is to be construed to extend to "all lands, tenements, and hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule." By the third sub-rule of No. III. in the same schedule in the case of "drains" and "other concerns of a like nature," the assessment is to be on the profits of the year preceding. A sewer is a drain or a concern of a like nature, and can only be assessed on profits under Rule III., and cannot be brought under Rule I. Further, a sewer such as the one in question, is not capable of actual occupation so as to come under Rule I, in which some meaning must be given to the word "actual." The authority is no doubt in possession of the sewer, but it cannot be said to be in actual occupation of it. It has been pointed out in many cases that sewers, streets, and such like subject-matters are vested in local authorities sub modo to the extent which is necessary for their maintenance for the use of the public: *Tunbridge Wells Corporation* v. *Baird* (3), and cases there referred to. The cases of streets and sewers stand on the same footing, and no claim has ever been made to charge income tax on streets. It follows, therefore, that this sewer is not assessable under any circumstances to income tax under Rule I., and if it comes under Rule III., no profit is derived from it and it is not chargeable. The mere benefit derived from it by the public of the district is not profit so far as the authority is concerned.

(1) [1901] A. C. 26, at p. 45. (2) [1905] 1 K. B. 184; [1906] A. C. 18.
(3) [1896] A. C. 434.

C. A. 1906

YSTRADY-FODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED.

[The following cases were also referred to: *Foley* v. *Fletcher* (1); *Attorney-General* v. *Earl of Sefton* (2); *Dublin Corporation* v. *M'Adam* (3); *Dillon* v. *Haverfordwest Corporation* (4); *Lambeth Overseers* v. *London County Council* (5); *Secretary of State in Council of India* v. *Scoble*. (6)]

Sir J. Lawson Walton, A.-G. (with him *Sir R. B. Finlay* and *W. Finlay*), for the respondent. It is said on behalf of the appellants that there is in this case no property in the nature of a hereditament vested in them. But there is something fixed in the soil of which they have been held to be occupiers. In the Income Tax Act, 1842, s. 63, Rule No. IX., which has reference to Scheds. A and B, sub-rule 2 is, "Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements." In view of this rule, it is difficult to see how the argument of the appellants can be supported. In *Metropolitan Ry. Co.* v. *Fowler* (7) the question was whether a tunnel made by the railway company was an easement or a hereditament liable to land tax, and it was held to be the latter. There is a close analogy to the present case, for, as in this case, the owner of the soil had been divested of his interest in that part which had been converted into a tunnel, and the company had acquired exclusive possession of it. So in *Westminster Corporation* v. *Johnson* (8) the corporation had acquired exclusive right to a portion of the sub-soil for the purpose of a lavatory, and were held to be liable to land tax. In *Bradford* v. *Eastbourne Corporation* (9) Lord Russell C.J. dealt with the effect of the word "vest," and described it as giving "such ownership and such rights only as are necessary for the purpose of carrying out the duties of the local authority with regard to the subject-matter." It has been suggested that the cases of a sewer and of a street are on the same footing, but in the latter case there is a limitation on the rights of the authority in whom the street is vested by reason of the public right of access.

This case falls within Rule No. I. unless the argument is sound

(1) (1858) 3 H. & N. 769.
(2) (1863) 2 H. & C. 362; (1865) 11 H. L. C. 257.
(3) (1887) 20 L. R. Ir. 497.
(4) [1891] 1 Q. B. 575.
(5) [1897] A. C. 625.
(6) [1903] A. C. 299.
(7) [1893] A. C. 416.
(8) [1904] 2 K. B. 737.
(9) [1896] 2 Q. B. 205, at p. 211.

that it falls under Rule No. III., sub-rule 3. The last-mentioned rule deals with the various properties mentioned in it only in connection with a concern, that is a trading concern, which can earn profits. In such a case the tax is charged on the profits of the year preceding. The appellants are certainly not a trading concern, and the rule is inapplicable even if, which is very doubtful, the word "drain" can be taken apart from the context and held to include a sewer.

[He was stopped.]

COLLINS M.R. This is an appeal from a decision of Walton J., in which he held that a sewer vested in and under the control of a local authority was, for the purpose of assessment to income tax, a hereditament capable of actual occupation and chargeable in respect of the annual value thereof according to Sched. A, Rule No. I., of the Income Tax Act, 1842.

The particular sewer dealt with in this case has been already the subject-matter of another legal decision, and the point there in question was whether the corporation were liable to be rated in respect of it, and it was decided that they were. (1) That decision cannot be ignored in dealing with this matter, because at the root of the discussion lay the assumption that the authority were occupiers of the tenement in respect of which they were there held to be rateable. In that case, as was pointed out to us, the question of occupation does not seem to have been disputed by counsel, presumably because they did not think it worth while to raise the point that the particular tenement was incapable of occupation, and that therefore there was no occupation; but the decision of the Court of Appeal in a considered judgment is that the authority were liable to be rated in respect of the sewer, and that assumed occupation on their part. However, the question of occupation does not rest on that alone. It seems to me that a decision of the House of Lords has established that a sewer such as this can be the subject-matter of occupation. That is the case of *London County Council* v. *Erith Churchwardens*. (2) In that

(1) *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee*, [1901] 1 K. B. 406.

(2) [1893] A. C. 562.

C. A. 1906

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED.

Collins M.R.

case Lord Herschell elaborately reviewed all the previous authorities relating to the rateability of sewers. There were undoubtedly at least two cases in which it had been held that sewers, in the particular circumstances of those cases, were not rateable, the primary ground being, as stated by Lush J., as he then was, that sewers were not the subject-matter of beneficial occupation. Lord Herschell, in reviewing those cases, treated them as anomalies, and as contrary to principle, and let it be seen that he was of the opinion, which was concurred in by the rest of the Law Lords, that if the matter were res integra there was no reason whatever why sewers should not be treated as rateable, and as rendering persons occupying them subject to rateability. The only reason he expressed for letting those cases stand was that, having regard to the nature of the question and the importance of the hereditaments involved, he thought it better to leave alone a decision which had been treated as law for a good many years, and, though he regarded it as anomalous and contrary to principle, not to actually upset the existing decisions in respect of those particular sewers. But when the case of this particular sewer came before this Court raising the concrete question whether this particular sewer rendered the local authority rateable in respect of it, the principle of the case in the House of Lords was considered; and notwithstanding the actual decision in respect of the sewers in question in that case, this Court held itself relieved from the authority of the previous cases, and, acting as it conceived according to the principle laid down by the House of Lords, held that this particular sewer now under discussion was the subject-matter of occupation, and was occupied by the authority so as to render it liable to poor rate. It seems to me, therefore, that it is now too late to discuss the question whether a sewer such as this is can be treated as a subject-matter of occupation.

The learned judge has held that the local authority are liable to be taxed under Sched. A, Rule No. I. That rule is in these terms: "General Rule for estimating lands, tenements, hereditaments, or heritages mentioned in Schedule (A). The annual value of lands, tenements, hereditaments, or heritages charged under Schedule (A) shall be understood to be the rent by the year at which the same

are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment, but if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments, or heritages, capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule." As to that it has been argued that the subject-matter of this schedule must be something that is capable of actual occupation, and that there is an inherent disability in sewers which renders them incapable of occupation, and even though they were capable of occupation, having regard to the peculiar rights which the authority take by statute in respect of sewers, they cannot be deemed to be occupiers of them. First of all, I think from what I have already said it is quite clear that sewers, in the opinion of the highest legal authority in the realm, are a proper subject-matter of occupation, and are capable of occupation. Then comes the question whether the local authority do not take such rights in and in respect of sewers as to render them the occupiers of them. It seems to me that, after all the discussion that has been concerned with the meaning of the word "vest" in the Public Health Act which vests the sewers in the authorities, it is quite clear that they have the property in the sewers in such a sense as to render them capable of occupying them, and I think the authority here, as was held in the case before this Court in which the same sewer was in question, are in point of fact the occupiers. There is nothing in the nature of their property and rights in respect of the sewers which debars them from being occupiers of the sewers. Therefore the first fundamental difficulty in holding that this case comes under Sched. A, Rule No. I., is disposed of.

But then we are referred to a few words at the end of the rule I have just been reading, which except from the operation of the rule "the properties mentioned in No. II. and No. III. of this schedule"; and it is said that when we look at the properties mentioned in No. III. we find that the particular subject-matter

C. A. 1906

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED.

Collins M.R.

of this discussion, namely, a sewer, is one of the properties mentioned, and therefore is ipso facto excluded from No. I.

When we come to look at the provisions of Rule No. III. it seems to me that that argument fails. The rule commences thus: "Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned, which are not to be charged according to the preceding general rule.—The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." There are three groups of properties described, the third of which is: "Of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding." Now the word "drains" occurs in that paragraph, but it occurs in connection with all the other words which I have read, and all are lumped together under the final words. The rule is therefore dealing with subject-matters which are called concerns, and with the profits made by the working of those concerns. The next clause throws further light upon the matter. "The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof." Those words all seem to me to point to something that is described as a concern; in other words, the rule refers to trading operations in the cases where these particular matters are subject-matters of trading, so that if the word "drain" in this context is to be regarded as covering the sewer in this case, the latter not being carried on for the purpose of profit would not fall within the class set out in No. III. Therefore it is not the fact that being got into class III. it is excluded from class I. It seems to me that it falls under Rule No. I., and that the appellants

are liable to income tax as being the persons in occupation of this sewer.

We are told that we are taking a step into the unknown, because it is said no hereditament of this kind has heretofore been held to be the subject-matter of income tax. But we must face that responsibility. It does not seem that the matter has been brought up for discussion before. The question before us is not whether the case has ever been brought before the Courts, but whether it falls within the actual words of the section which we are bound to construe and to apply.

For the reasons I have given, the case seems to me to fall directly within the express provisions of Sched. A, Rule No. I., and on those grounds I think the decision of the learned judge was right, and this appeal must be dismissed.

Cozens-Hardy L.J. I am of the same opinion. We have had an interesting and important discussion as to the precise rights and legal position of a sewer authority with reference to a sewer. In the present case we are not at all concerned with the lateral and vertical condition of the subject-matter of ownership, if there be ownership, of this sewer authority. We are only concerned with what I may call the physical sewer itself. I think it has now been settled by a long series of authorities binding upon all Courts that a sewer vests in the authority, not merely in the sense of their having an easement, but in the sense that they are owners of the space embraced by the sewer, and that they have a right to that space as owners, so long as it is required for the purposes of the sewer. Perhaps the last authority on that point is the case of *Westminster Corporation* v. *Johnson* (1), in which the present Master of the Rolls said: "The persons acquiring the interest are a corporation, and acquire it in fee." They acquire it in fee, subject to a defeasance analogous to that in the case of an estate durante viduitate. We are not really concerned here as to when or under what circumstances it may come to an end. I think there is no doubt the authority are the owners of this sewer, and they have the property vested in them.

(1) [1904] 2 K. B. 737, at p. 745.

C. A. 1906

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED.

Cozens-Hardy L.J.

Then the question is, Are they in actual occupation? Again, I think that is not open to us. It is to be remarked that with reference to this very sewer, this Court has, as I read it, absolutely decided that point. It was elaborately argued there for the respondents, as will appear on p. 411 of the report in [1901] 1 K. B.: "There is clearly in such a case a beneficial occupation of the sewer as an independent hereditament by the authority. Still more clearly is there such an occupation where payments are received by the authority for the use of the sewer by other authorities. It is not necessary, in order to constitute a beneficial occupation for the purpose of rateability, that there should be a balance of profit over and above expenditure." The point was clearly raised there; it was absolutely necessary for the decision, and I regard as not open to us the question as to occupation—not merely nominal occupation, but actual occupation—of this sewer by the appellants. That being so, the case seems to me to come within the clear and express language of the first part of Rule No. I. of Sched. A. This is a hereditament capable of actual occupation for whatever purpose occupied or enjoyed, or of whatever value. But then it is said there is an exception of property in Rule No. III. When that rule is looked at, it appears that it is dealing, not with properties of the particular kinds mentioned standing alone, but with concerns carrying on a business for the purposes of profit, and in such cases income tax is to be assessed with reference to the profits almost, though not entirely, on the same principle as that in Sched. D. In the course of the argument I suggested the case of a quarry of stone worked by a landowner on his own estate for the purposes of his own estate. That would clearly come under Rule No. I., and it would not in my view come within No. III., because no profits were received from it; it would not be a concern which the landowner was carrying on; it is not a case in which any person having the management of it could be said to be in receipt of the profits thereof. In my view it cannot be said that the local authority are here carrying on this sewer for the purposes of profit, or with a view to the receipt of profits. That being so, the case does not fall within Rule No. III., and does fall within Rule No. I., and the

view of Walton J. was right, and the income tax must be paid on that footing.

COLLINS M.R. I desire to add that I had intended to refer to Rule No. IX. defining "occupation." It is as follows: "Rules for charging the said duties under Schedules (A) and (B). First—The said duties, except where other provisions are made as aforesaid for estimating particular properties, shall be estimated according to the general rule contained in Schedule (A), and shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns. Second—Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements."

FARWELL L.J. I am of the same opinion. I rely on the rule just read by the Master of the Rolls, because it appears to me to be impossible to predicate of this local authority that they have not the use of the sewer in question, and that that sewer is not land or a tenement. It must be either land or a tenement or both, and nobody but the local authority can have the use of it.

On the second point I am struck by the contrast between the annual value in Rule No. I., arrived at by the rent, which is fact, or by the hypothetical tenants' rent which is estimate, and the profits mentioned in Rule No. II., received from trading, resulting, or intended to result, in actual profit, the tax on which is measured by the amount thereof.

I agree with the conclusion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Wrentmore & Son, for Bruce & Nicholas, Pontypridd.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

A. M.

C. A.
1906
Dec. 1.

[IN THE COURT OF APPEAL.]

DIGBY *v.* THE FINANCIAL NEWS, LIMITED.

Practice—Pleading—Libel—Defence of Fair Comment—Particulars.

The defence to an action for libel in a newspaper article that "in so far as the words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact; in so far as they consist of comment, the same were fair and bona fide comment upon a matter of public interest," is a defence of fair comment and not a justification.

The plaintiff advertised in a daily paper for a partner with 250*l.* to complete the formation of a syndicate already registered. In reply to a letter of inquiry from a correspondent of the defendants, who were the proprietors of a different paper, the plaintiff forwarded particulars of the syndicate, together with reports and other documents relating to it. An article having been published in the defendants' paper, in which the particulars and documents supplied by the plaintiff were commented upon in a satirical vein, the plaintiff brought an action for libel, to which the defence set out above was (inter alia) pleaded, and particulars of the defence were given. The plaintiff applied for further and better particulars of the defence, asking for particulars as to whether the defendants alleged that any of the statements made in the particulars and documents sent by the plaintiff were untrue, and, if so, which of them:—

Held, that the defence being one of fair comment only, and no justification having been pleaded, the plaintiff was not entitled to the particulars sought.

Appeal of the defendants from an order of Bucknill J. at chambers affirming the order of a Master for further and better particulars of a paragraph of the defence in an action of libel.

The facts giving rise to the action and to this appeal, which were set out at great length in the pleadings, were shortly as follows. The plaintiff had inserted the following advertisement in the *Daily Telegraph*, a London newspaper: "Two hundred and fifty pounds. Advertiser requires partner with 250*l.*, to complete promotion of parent colliery syndicate, already registered. Valuable virgin coal areas obtained, and subscription of one-third of working capital definitely arranged. The 250*l.* will be returned and liberal share in profits given, ensuring large income. Absolutely genuine. Address by letter . . . ." The advertisement was read by one Carruthers, who wrote to the

address given for particulars of the matter referred to, and received from the plaintiff a letter with particulars of the proposed syndicate, together with certain reports and other documents relating to it. These papers were handed over by Carruthers to the defendants, who were the proprietors of a newspaper called the *Financial News*. Shortly afterwards an article of some length was published in the defendants' paper, commenting in a satirical vein upon the advertisement, and upon the particulars and documents sent by the plaintiff to Carruthers. This was the article complained of as libellous. In the statement of claim the article was set out at length, with an innuendo as follows: "By the said words the defendants meant, and were understood to mean, that the plaintiff had dishonestly attempted to induce a correspondent of the said newspaper to pay to the plaintiff the sum of 250*l*., and that the statements made in the documents referred to in the said libel were false and misleading to the knowledge of the plaintiff, and had been made and put forward by the plaintiff for the purpose of dishonestly inducing the said correspondent to pay to the plaintiff the said sum of 250*l*., and that . . . . the plaintiff was engaged in fraudulent, dishonest, and discreditable attempts to raise money from the public for his own benefit, and was a person of disreputable character." The defence admitted the publication of the article and the handing of the documents to the defendants by Carruthers; it denied that the words bore the meaning placed upon them, and said that the article was no libel, and then followed a plea (in paragraph 8) in the following terms: "In so far as the said words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact; in so far as they consist of comment, the same were fair and bona fide comment upon a matter of public interest. The said words were published upon a privileged occasion." The defence contained also particulars of the matters alleged in paragraph 8, which were in these words: "The statements of fact in the words complained of are a true statement of matters appearing in the said particulars and documents furnished by the plaintiff to the said Carruthers, and of what had passed in writing between the plaintiff and the said

C. A. 1906

DIGBY v. FINANCIAL NEWS, LIMITED.

Carruthers, and between the plaintiff and his solicitors and the defendants. The comments contained in the words complained of were fair comments upon the said facts and upon the plaintiff's said public invitation for money, and were made by the defendants in good faith and without malice, and in the ordinary course of their conduct of the said newspaper." The plaintiff then took out a summons for further and better particulars of paragraph 8, asking for particulars of the statements of fact which the defendants alleged to be true in substance and in fact, and further asking whether the defendants alleged that any of the statements made in the particulars and documents sent by the plaintiff to Carruthers were untrue, and if so, which of them. Upon this summons the Master made an order for "further and better particulars of justification," which order was affirmed by the learned judge. The defendants appealed. (1)

Rufus Isaacs, K.C. (*Norman Craig* with him), for the defendants. The order was wrong. It is conceded that it does not express the point at issue between the parties, which is, put shortly, whether paragraph 8 of the defence amounts to a plea of justification or not.

[COLLINS M.R. The plea is not a plea of justification, but merely one of fair comment.]

That is the defendants' contention. The article is a comment upon statements made by the plaintiff in the advertisement and in the documents supplied by him. The defendants cannot be ordered to give particulars as to the truth or falsity of the statements made by the plaintiff in his documents, for they do not know whether they are true or not; the only possible portion of the paragraph that can be said to resemble in any sense a justification being the averment that the plaintiff had sent the documents to Carruthers. The defendants are in effect being asked to give particulars of the innuendo which the plaintiff alleges and the defendant denies, that the article bears; this they cannot be asked to do. The plaintiff is endeavouring to

(1) The case was originally argued before Cozens-Hardy L.J. and Farwell L.J., and subsequently re-argued before the present Court of three judges.

force the defendants against their will into the position of accusing him of dishonest conduct.

Montague Lush, K.C., and *McCardie*, for the plaintiff. Taking the paragraph of the defence as a whole, it amounts to a plea of justification, and not merely to one of fair comment. To say that an article is merely fair comment means that there is no libel; but a libel is not necessarily confined to a direct statement of fact; the language used may on the face of it be complimentary, as in *Boydell* v. *Jones* (1), where it was held libellous to call an attorney "an honest lawyer" with an ironical meaning. Dealing with the language used, not in its literal meaning, but in the sense in which it was intended that it should be understood by those who read it, it is clear that the defendants were putting forward statements of fact wrapped in apparently complimentary language, and they are now seeking to get the advantage of a plea of justification without in terms pleading it. The plea is really a compendious form of pleading justification and fair comment, and was apparently so treated by the Divisional Court in *Penrhyn* v. *Licensed Victuallers' Mirror* (2), where particulars were ordered.

[COLLINS M.R. The only particulars you can be entitled to are as to what are the materials upon which the comment is based, and here they are set out at length in the defence.]

The jury may find that the words are not fair comment, and the defendants must be prepared to justify them in any reasonable sense which the jury may place upon them. If an alleged libel is capable of more than one meaning, the plaintiff is entitled to know whether the defendant intends to justify it in all its meanings, or in which of them: *Hennessy* v. *Wright*. (3)

[COZENS-HARDY L.J. In that case there was an absolute plea of justification, of which no particulars were given.]

If the language is fairly capable of meaning that the defendants are making an imputation of dishonesty, the plaintiff is entitled to particulars.

[They also cited *Devereux* v. *Clarke & Co.* (4) and *Fleming* v. *Dollar*. (5)]

(1) (1838) 4 M. & W. 446.
(2) (1890) 7 Times L. R. 1.
(3) (1888) 57 L. J. (Q.B.) 594.
(4) [1891] 2 Q. B. 582.
(5) (1889) 23 Q. B. D. 388.

C. A. 1906

DIGBY v. FINANCIAL NEWS, LIMITED.

COLLINS M.R. This is an appeal from an order of Bucknill J. at chambers, affirming the order of a Master for further and better particulars in an action of libel. The question arises thus. The plaintiff advertised in a London newspaper in the following terms: "Two hundred and fifty pounds. Advertiser requires partner with 250*l.* to complete promotion of parent colliery syndicate already registered. Valuable virgin coal areas obtained, and subscription of one-third of working capital definitely arranged. The 250*l.* will be returned and liberal share in profits given, ensuring large income. Absolutely genuine. Address by letter." It is common ground that this advertisement was inserted by the plaintiff. The statement of claim sets out that one Carruthers wrote to the plaintiff with a request for particulars of the scheme, which were forwarded confidentially, together with reports and other documents, by the plaintiff to Carruthers; that these were then handed by Carruthers to the defendants, who thereupon published the libel complained of. The alleged libel, which is set out in the statement of claim, purports to summarize the effect of the documents which had been sent by the plaintiff to Carruthers, and which had got into the possession of the defendants; that involved statements of fact as to the purport of the documents, made in the alleged libel: then there were set out certain letters which had passed between the parties, and the whole concluded with an innuendo and a claim for damages. In their defence the defendants admitted the publication of the alleged libel (of course without the innuendo), and further admitted the sending of the documents by the plaintiff to Carruthers, and by the latter to the defendants; then they denied that the words bore the meaning alleged in an elaborate and carefully-framed innuendo, and said that the words were not libellous. Then in paragraph 8 of the defence comes the plea which has given rise to the present discussion. It is in these words: "In so far as the said words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact; in so far as they consist of comment, the same were fair and bona fide comment upon a matter of public interest. The said words were published upon a privileged occasion." Then come the

particulars of that plea, the substantial parts of which are: "The statements of fact in the words complained of are a true statement of matters appearing in the said particulars and documents furnished by the plaintiff to the said Carruthers, and of what had passed in writing between the plaintiff and the said Carruthers, and between the plaintiff and his solicitors and the defendants. The comments contained in the words complained of were fair comments upon the said facts and upon the plaintiff's said public invitation for money, and were made by the defendants in good faith and without malice and in the ordinary course of their conduct of the said newspaper."

Upon that the plaintiff took out a summons for, among other things, particulars of the statements of fact which the defendants alleged to be true, and whether they alleged any of the statements in the plaintiff's documents to be untrue, and which. The real point of the present appeal does not arise upon the first part of this summons, as to which it seems that there would in the circumstances be no reason for asking for further particulars; sufficient particulars have been already given in the defence itself. But the plaintiff seeks to get something further, to get a statement whether the defendants dispute the truth of any of the facts or statements in the documents sent by the plaintiff to Carruthers. It is upon this second part of the summons that the question arises, and it is a very different matter from the first part of the summons, for the allegations contained in the documents in question may be matters with the truth of which the defendants are not concerned. We have to say whether the pleadings are such as to make it proper that the particulars asked for should be given.

When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel. This plea does not purport to be a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort, but is a plea intended to raise a totally different defence, that of fair comment. Comment, in order to be fair, must be based upon facts, and if a defendant cannot shew that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. The

C. A. 1906

DIGBY v. FINANCIAL NEWS, LIMITED.

Collins M.R.

usual way to begin such a plea is by asserting that the facts on which the comment is based are true, that is, that the defendant has made no misstatements in formulating the materials upon which he has commented. If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair. It is therefore a necessary part of a plea of fair comment to shew that there has been no misstatement of facts in the statement of the materials upon which the comment was based. The plea in the present case goes no further than this, that there has been no misuse by the defendant of the materials upon which he commented; it involves no assertion one way or the other as to whether the mine spoken of is in existence, or is valuable, or whether the experts were competent; none of those matters are involved in the allegations of fact in the pleadings; the defendants have merely set out the materials upon which they based their comment, and as these materials were supplied by the plaintiff himself to Carruthers, there is an end of any summons for further and better particulars. The plaintiff has attempted to force the defendants beyond their true position and to fasten upon them an allegation that the facts stated in the plaintiff's documents were untrue, and that they imputed fraudulent conduct to the plaintiff. But it is not for the defendants to make out a cause of action for the plaintiff, and it is important that in libel actions the Courts should take no steps which would impair the right of bona fide free comment on the admitted acts of individuals; for that reason, if for no other, we ought not to be sedulous in assisting the plaintiff to find out a cause of action. The plaintiff seems now to be seeking to find a cause of action different from that in respect of which the action was brought The defendants assert, and will have to prove, that their comments were made in the public interest, that they were within their rights in making the comments they did make, and that so long as they misstated no fact which formed the basis of their comment there was nothing which could be a cause of action. That is a position which the defendants are entitled to take up, and their rights must be measured by it; if at the trial the jury should be of opinion that by the article imputations were conveyed which

involved a suggestion that the plaintiff had garbled the facts, then, as the pleadings stand, no evidence could be given by way of justification. The only defence on the pleadings is one of fair comment, and if it should become necessary for the defendants to rely upon the truth of statements which the jury find to be injurious to the plaintiff, the defendants could not possibly succeed in the absence of a plea of justification. I think there was some confusion in the minds of both the Master and the Judge at chambers between a plea of justification, which must cover any imputation which the words in their context may be taken to convey, and a plea of fair comment, which is based upon the truth in fact of the statements upon which the comment is founded. But for that confusion I think that the order for further and better particulars would not have been made, and in my opinion this appeal should be allowed.

COZENS-HARDY L.J. I am of the same opinion. I had reached the same conclusion on the occasion of the previous argument, but I thought that the practical importance of the question made it desirable that it should be re-argued. The case may be put shortly. There are certain facts which, upon the pleadings as they stand, it is essential that the defendants should establish at the trial; they must shew that the documents sent by the plaintiff to Carruthers really contained the statements which the newspaper article stated they contained. That, I think, is all that is meant by paragraph 8 of the defence, when it says that "in so far as the said words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact." I cannot read that paragraph as in any way raising the issue whether the statements made in the documents were true. For example, it is stated in the article that according to one of the documents the plaintiff said that he had made definite arrangements for a subscription of 2000*l.* towards a working capital of 6000*l.*; the defence raises the issue whether the document contained that statement, but not the issue whether that statement was true. Why should the defendants, by means of the particulars which it is sought to obtain from them, be required to try an issue which they do not

C. A. 1906

DIGBY v. FINANCIAL NEWS, LIMITED.

Cozens-Hardy L.J.

seek to raise, or to give the plaintiff a certificate of good character? The answer to an attempt to make them do so is that the defendants have carefully abstained from placing on the record a plea of justification, and, that being so, it would be wrong to require them to give particulars which it would have been proper to require of them if they had pleaded justification. There being no plea of justification, except in the limited sense to which I have alluded, the order was wrong, and the appeal should be allowed.

FARWELL L.J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *S. A. Clench & Co.*
Solicitors for defendants: *Lewis & Lewis.*

W. J. B.

1906
Dec. 7, 10.

[IN THE COMMERCIAL COURT.]

OPPENHEIMER *v.* ATTENBOROUGH & SON.

Factor—"Mercantile Agent"—Authority to Pledge, Extent of—Custom of Particular Trade—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

The authority given by s. 2 of the Factors Act, 1889, to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in a particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them.

Quære, whether the fact that possession of the goods is obtained by a mercantile agent from his employer by means amounting to larceny by a trick operates to deprive a subsequent bona fide pledgee of the goods of the protection of s. 2 of the Factors Act, 1889. (1)

ACTION tried by Channell J. without a jury.

The action was brought by the plaintiff, a dealer in diamonds carrying on business at Holborn Viaduct, against the defendants, a firm of pawnbrokers in Fleet Street, to recover certain parcels

(1) See *Oppenheimer* v. *Frazer & Wyatt*, *post*, p. 519.

of diamonds which were alleged to have been wrongfully pledged with the defendants for a sum of about 1200*l*. It appeared from the evidence that the plaintiff had been from the year 1888 acquainted with a diamond broker named Schwabacher, who had previously been a member of a firm of diamond merchants, called Schwabacher Brothers, until that firm ceased to exist. Schwabacher had originally obtained advances from the defendants upon the security of diamonds pledged by him in the year 1898, when he was trading as a diamond merchant, and from that date until the transactions which gave rise to the present proceedings he had continued to pledge diamonds with the defendants from time to time, frequently taking out stones already in pledge and replacing them by others. In April, 1906, Schwabacher came to the plaintiff's office and asked the plaintiff to let him have some diamonds to shew to two firms of diamond merchants, whose names he gave, to whom he thought he could sell them. The plaintiff, relying upon Schwabacher's statement, let him have a number of diamonds, and gave him a commission note, in which he inserted the price at which the diamonds might be sold. Schwabacher did not shew the diamonds to either of the firms named by him, but pledged them with the defendants for an advance of money to himself, sending a note to the plaintiff to the effect that the diamonds were sold. These dealings were repeated on more than one occasion before the dishonesty of Schwabacher was discovered by the plaintiff, who, on the refusal of the defendants to give up the diamonds pledged with them, brought the present action. At the trial evidence was given by several diamond merchants and diamond brokers on behalf of the plaintiff to the effect that a diamond broker, employed to sell diamonds, had no authority to pledge them in order to obtain advances of money for his principal, and that it was an unheard-of thing in the trade to employ a broker to pledge diamonds.

Rawlinson, K.C. (*Rufus Isaacs, K.C., H. Dobb* and *Dunkels* with him), for the plaintiff. The plaintiff employed Schwabacher as a diamond broker only, and it was the duty of the latter to take the diamonds to the firms named and sell them,

1906

OPPENHEIMER v. ATTENBOROUGH & SON.

if possible, and, in the event of his being unable to sell them, to return them to the plaintiff; as a diamond broker there was no authority in Schwabacher to pledge them, it not being part of his ordinary course of business as such to pledge diamonds entrusted to him for sale. The protection given by s. 2, sub-s. 1, of the Factors Act, 1889, to dispositions by mercantile agents of goods entrusted to them by their owners does not extend to every disposition by everyone who comes within the definition of a "mercantile agent" in s. 1 of that Act (1); it extends only to dispositions by a mercantile agent of a particular class acting in the ordinary course of business of that particular class of mercantile agent. Schwabacher, if a mercantile agent, was a diamond broker, and in pledging the diamonds he was not acting in the ordinary course of business of a diamond broker. That is not merely the result of the evidence, but also follows from the decision in *Hastings* v. *Pearson* (2), where Mathew J. held that it was no part of the business of an agent to pledge small articles of jewellery in order to raise money for his employer. Further, Schwabacher was not in possession of the diamonds with the consent of the true owner within the meaning of s. 2, for the means by which he obtained possession of them amounted to larceny by a trick, and the transactions of pledge are therefore not protected. The plaintiff never intended to part with the goods except for the purpose of their being sold by Schwabacher to one of the two firms mentioned by him, whereas Schwabacher intended to

(1) By 52 & 53 Vict. c. 45 (the Factors Act, 1889), s. 1, sub-s. 1: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of of goods."

By s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

(2) [1893] 1 Q. B. 62.

pledge them immediately, and the obtaining possession under such circumstances is larceny by a trick: *Reg.* v. *Buckmaster.* (1) Where goods are so obtained, a pledge of them by the mercantile agent would not come under the protection of the Factors Acts; this is apparent from the judgments of Collins L.J. in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (2), and of Blackburn J. in *Cole* v. *North Western Bank.* (3) [He also cited *Hardman* v. *Booth.* (4)]

J. A. Hamilton, K.C. (*C. L. Attenborough* with him), for the defendants. First, the transactions with Schwabacher were bona fide transactions on the part of the defendants and are protected by the Factors Act, 1889. The custom that agents employed to sell may pledge their employers' goods to secure advances, though not recognized by the common law, had become general by 1842, as appears from the preamble to the Factors Act of that year, and that Act not only recognized the existence of the custom, but gave it a statutory sanction; there is no reason for supposing that in passing the Act of 1889 the Legislature intended to narrow the law enacted in 1842. The protection is given in the case of every person acting in the ordinary course of the business of "a" mercantile agent, which is a perfectly general term, and there is no reason for restricting it to a mercantile agent in a particular trade; it is immaterial that the commodity entrusted to the mercantile agent happens to be diamonds. Schwabacher comes within the wide definition of "mercantile agent" in s. 1 of the Act of 1889. If the contention of the plaintiff is right, the members of a particular trade could always put themselves outside the operation of the Factors Act by setting up a custom peculiar to their own trade, and the whole intention of the Legislature would be defeated.

Secondly, there is a complete absence of anything that would entitle one to say that Schwabacher was not in possession of the goods with the consent of the true owner. There is no evidence of larceny by a trick. Under s. 2, sub-s. 4, of the Act of 1889 the consent of the true owner shall be presumed in the absence of

(1) (1887) 20 Q. B. D. 182.
(2) [1899] 1 Q. B. 643, at p. 659.
(3) (1875) L. R. 10 C. P. 354, at p. 373.
(4) (1863) 1 H. & C. 803.

1906

OPPENHEIMER v. ATTENBOROUGH & SON.

evidence to the contrary; here there has been proved not only consent in fact, but also a course of business inconsistent with the view that there was no consent.

Rawlinson, K.C., in reply.

CHANNELL J. In my opinion this case depends entirely upon the construction of the Factors Act, 1889, which is the last of a series of Acts and repeals the former statutes. The Act has a double object, but in the main it appears to me that the Legislature intended to re-enact in shorter, and what was supposed to be clearer, language the provisions of the former Acts as interpreted by judicial decisions. The expression "mercantile agent" is, I think, there used for the first time, the former Acts having dealt with "agents" simply, and the Courts having been largely employed (for the decisions are numerous) in defining the class of agent who would come within the Acts, and in excluding from their operation other classes of persons, such as warehousemen, servants, &c.; and there were also classes of persons who, though agents for some purposes, were held not to be agents within the meaning of the Acts. I think, therefore, that in employing the expression "mercantile agent" in the Act of 1889 the Legislature intended to express in a compendious form the result of the decisions as to who were agents within the previous Acts, and that the expression or definition "mercantile agent" in s. 1 substantially represents the result of those judicial decisions. In some respects the previous Factors Acts were altered by the Act of 1889, but the general scope of the Act is the same. So far as concerned the sections of the previous Factors Acts which dealt with pledging, the important point that had been decided was that, whereas at common law pledging was taken to be entirely outside the authority of an agent to sell, it had been made part of his authority by that legislation. The intention is clear from the preamble to 5 & 6 Vict. c. 39, and it has been explained in a whole series of elaborate judgments that the effect of the Acts was to add to the actual authority of an agent to sell a statutory authority to pledge; this view proceeded on the ground that, although in early decisions it had been held to be entirely out of

the scope of the authority of an agent employed only to sell that he should also have power to pledge, yet by the course of business pledging had become so usual that the Legislature thought it desirable to give an agent this statutory authority by means of the Factors Acts. I cannot think that it was intended by the Act of 1889 to alter what had been accomplished by the previous Acts, and I think that the Act has the same effect of giving to the agent a statutory authority to pledge, subject only to this qualification, or rather explanation, that the pledging must be in the ordinary course of business of a mercantile agent.

The main question, and the difficult question, in the present case is whether there is any difference in the statutory authority to pledge of an agent employed to sell diamonds in the diamond trade, for it has been shewn to be at any rate unusual for a broker employed to sell diamonds to have authority to pledge them, that being a business which in the particular trade the merchant prefers to do for himself. In my opinion, however, that fact makes no difference. When examined, it really comes to this: that the members of any particular trade can get themselves out of the operation of the Factors Act by saying that they will only authorize their agents to sell and will never give them authority to pledge; but this is the very kind of thing which the statute was intended to meet. It was meant to sanction the making of advances to a mercantile agent, although he had in fact—but not to the knowledge of the lender, whose knowledge would raise a different question—restrictions upon his authority which would prevent it being within his authority to pledge. In the present case it would have been very different if the plaintiff could have gone on to say that it was well known that no diamond broker had authority to pledge, and that the defendants not only must have known this custom, but did in fact know it and with that knowledge dealt with Schwabacher on the supposition that he was a diamond broker; the plaintiff might then have contended that the transaction would not hold. Nor would it hold in that case, for the defendants would then have undoubtedly had notice that Schwabacher had not authority to make the disposition, and that would have defeated the pledge. But I am clearly of opinion that the expression "in the ordinary course of

1906

OPPENHEIMER v. ATTENBOROUGH & SON.

Channell J.

business of a mercantile agent" means "a mercantile agent," and not "the mercantile agent" which that particular man happened to be—in other words, a mercantile agent, independently of the particular goods with which he deals. If the pledgee were to know that the goods offered to him were goods of a particular kind which the agent never has any authority to pledge, the validity of the transaction would probably be defeated by the other words to which I have referred, "notice that he has not authority to make the same"; that must depend upon the facts of the particular case. I need say no more on that particular aspect of the matter.

Looking to the first portion of the section, in which occur the words "where a mercantile agent is with the consent of the owner in possession of goods," one sees at once that the expression "the consent of the owner" has been substituted for the word "entrusted" in the earlier Act. I think there is no real difference between the two expressions, and if I wanted authority for that view *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) is an authority that the two expressions are practically identical in meaning. Then, again, it has been clearly laid down that, where the "entrusting" or the "consent" exists in fact, it is no answer to say that it has been obtained by fraud; that is undisputed. But it is said that a different rule applies if the fraud amounts to larceny, a contention which seems to me difficult to understand. Of course, in larceny there would ordinarily be no consent, but this particular kind of larceny, which is called larceny by a trick, is somewhat peculiar; on the facts, however, I do not think that larceny by a trick has been made out. No doubt it has been substantially proved that Schwabacher committed numerous frauds, although it may be that on the first occasion he had no deliberate intention to commit a fraud when he obtained possession of the diamonds; but when one considers how long this course of conduct had continued, it is impossible to avoid suspecting that his object all through was to put money into his own pocket. It has been satisfactorily shewn that he never went near one of the two firms to whom he pretended to be selling the plaintiff's diamonds. I have no doubt as to the

(1) [1899] 1 Q. B. 643.

bona fides of the plaintiff, or that he says truly that when these transactions began the customers to whom Schwabacher was going to take his diamonds were the two firms which he named, but it seems very unlikely that he asked that question on every occasion. Sometimes Schwabacher was abroad, and his letters contain nothing on that subject, and I am not satisfied that the statement was always made by him to the plaintiff. Then, as regards one of the two firms, there is no evidence whether the diamonds were ever taken to them. The greater part of the diamonds in question here were taken in small quantities to the defendants' place of business and substituted for others already in pledge. That the conduct of Schwabacher was dishonest no one can doubt, but I am not satisfied that the diamonds were obtained by larceny by a trick, though it is possible that he might have been convicted on an indictment for that offence. But I feel considerable doubt as to the view that when the facts amount to larceny by a trick, the case is thereby taken out of the statute. In dealing with the question most of the learned judges who have considered it have protected themselves by some such expression as "In the case before us it did not amount to that," and that is my own position in the present case; but at any rate there is no case which can be regarded as a direct authority that larceny by a trick takes a case out of the Factors Act.

Finding, as I clearly must upon the facts, that there was consent on the part of the owner, and there being a section in the Factors Act as to presuming the owner's consent, the proposition is clearly established that these diamonds were in the possession of a mercantile agent with the consent of the true owner; the question then arises, Did the mercantile agent deal with them in the ordinary course of business of a mercantile agent? I do not think that we have to inquire whether he dealt with them as a diamond broker would ordinarily deal with them, but whether he dealt with them as a mercantile agent would ordinarily do. These diamonds were taken to a pawnbroker, who, according to the evidence, constantly advances considerable sums of money upon parcels of diamonds and other precious stones, and I see no reason for saying that that is out of the ordinary course of

1906

OPPENHEIMER v. ATTENBOROUGH & SON.

Channell J.

business. The facts are wholly different from those in *Hastings* v. *Pearson* (1), in which Mathew J. said that it was no part of the business of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent; that is plain, but is in my opinion very different from pledging considerable parcels of goods and raising a substantial sum of money upon them. Take as an example the case of a foreign diamond merchant, who consigns diamonds to an agent here to sell for him, and, as they are not sold quickly, requires an advance upon them; that is a case which one of the witnesses said had happened to him, and that in such cases he had made advances himself. It is true that for some reason which I do not appreciate the same witness said that in his opinion it would be wrong for any agent to take upon himself to pledge the diamonds under such circumstances, but I see no reason for holding that precious stones differ from any other kind of merchandise, especially in view of the fact that the statutes have said in the most general terms that it has become the ordinary course of business for agents to procure advances upon merchandise. I think, therefore, that it is impossible to say that what was done in this case was outside the ordinary course of business of a mercantile agent. No doubt a mercantile agent would not take bales of goods to a pawnbroker's for the purpose of raising money on them, but he could take the bills of lading, and it seems equally appropriate to take diamonds for the same purpose. I cannot, therefore, put a different construction upon the language of the Factors Act, 1889, to that which I should have placed upon the earlier statutes.

There remains only the question whether the person taking under the disposition "acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." [The learned judge discussed the evidence upon this point, holding that there was nothing to raise a suspicion in the minds of the defendants that they were dealing with an agent and not with a principal, and concluded thus:—] There is nothing whatever to justify the slightest reflection upon the good faith of the defendants, and I

(1) [1893] 1 Q. B. 62.

am clearly of opinion that these transactions were protected by the Factors Act, 1889, and that the defendants are entitled to judgment.

Judgment for the defendants.

Solicitor for plaintiff: *Julius A. White.*
Solicitor for defendant: *Stanley Attenborough.*

W. J. B.

OPPENHEIMER *v.* FRAZER & WYATT AND ANOTHER.

1906
Dec. 15.

Sale of Goods—Possession obtained by Larceny by a Trick—Mercantile Agent—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1—*Purchase on Joint Account.*

A mercantile agent obtained possession of the plaintiff's goods under circumstances which amounted to larceny by a trick, and handed the goods to B. to sell for him. B., who had grounds for suspecting the mode in which the mercantile agent had obtained possession of the goods, sold them to a firm, who purchased them in good faith and agreed with B. that their purchase should be on the joint account of B. and themselves. They accordingly debited B. in their books with half the purchase price, and, having resold the goods at a profit, credited him with half the profit. In an action for conversion of the goods against the firm and B.:—

Held that, the mercantile agent being in possession of the goods as a mercantile agent with the consent of the owner, it was immaterial, as regarded the title of the firm to the goods, that the mercantile agent had when he obtained the goods intended to steal them; that s. 2 of the Factors Act, 1889, applied, and gave the firm a good title to the goods; that that title was not affected by their having purchased on joint account with B., who had acted in bad faith, but that B. was liable to the plaintiff for the conversion of the goods.

FURTHER CONSIDERATION.

The action was tried by Channell J. and a special jury in the Commercial Court.

It appeared that the plaintiff was a diamond merchant, and that he parted with the possession of several parcels of diamonds to a man named Schwabacher, a diamond broker, who represented to the plaintiff that he had prospective customers for the diamonds in two firms whose names he mentioned. Having got possession of the diamonds, Schwabacher did not take them to either of

1906

OPPENHEIMER v. FRAZER & WYATT.

the firms he had mentioned, but pledged some of them and gave the others to one Broadhurst, with whom he had previous transactions, asking him to sell them for him. Broadhurst took the diamonds to the defendants Frazer & Wyatt, a firm of diamond merchants, explaining that he brought them from Schwabacher, who wanted to sell them for cash and that he (Broadhurst) had not the money to buy them himself, and asked Frazer & Wyatt to purchase them from Schwabacher on joint account with himself (Broadhurst). This Frazer & Wyatt did, paying the full amount of the price by their cheque in favour of Schwabacher and taking invoices for the diamonds from him to themselves. They then debited Broadhurst in their books with half the purchase price of the diamonds, and, having ultimately sold them at a profit, credited him with half the profit. The action was brought for conversion by the plaintiff against Frazer & Wyatt and Broadhurst, and at the trial the jury found that Schwabacher, in obtaining the diamonds from the plaintiff, had been guilty of larceny by a trick, that Broadhurst had not acted in good faith, and that Fraser & Wyatt had acted in good faith. (1)

Rawlinson, K.C., and *H. Dobb* (*Rufus Isaacs*, K.C., and *Dunkels* with them), for the plaintiff. The plaintiff is entitled to judgment against all three defendants. Although the jury have found that Frazer & Wyatt acted in good faith in the transaction, the fact that they took the diamonds on joint account with Broadhurst, who has been found by the jury not to have acted in good faith, vitiates their possession of the diamonds. They were partners with Broadhurst pro hac vice, and, as he was not acting in good faith, they also must be taken to be affected by his fraud: *Reid* v. *Hollinshead*. (2)

(1) By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

(2) (1825) 4 B. & C. 867.

Secondly, Schwabacher having obtained the goods by means of larceny by a trick, his possession of them does not come within s. 2 of the Factors Act, 1889. In *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) Collins L.J. said: "However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick. . . . he can by his disposition give a good title." It is plain from that case, and from *Cole* v. *North Western Bank* (2), that where there is larceny by a trick the operation of the Factors Act is defeated. The larceny by a trick prevented Schwabacher from being in possession of the diamonds "with the consent of the owner" within the meaning of s. 2: *Kingsford* v. *Merry* (3); *Hardman* v. *Booth* (4); *Baines* v. *Swainson.* (5) Where the owners have parted with the possession of goods under a complete misrepresentation of the facts there can be no contract of bailment.

[CHANNELL J. referred to *Sheppard* v. *Union Bank of London.* (6)]

Where the two parties to a contract are not ad idem there can be no contract. Schwabacher meant to steal these goods. He never intended to take them as a mercantile agent; and the plaintiff therefore, though he parted with the diamonds, did not entrust them to Schwabacher as a mercantile agent, and the Factors Act does not apply.

J. A. Hamilton, K.C., and *Norman Craig* (*Sir E. Carson, K.C.*, with them), for the defendants. Judgment must be given for all the defendants on these findings of the jury. If the question whether or not there had been an entrusting of goods by the owner to a mercantile agent depended on the mind of the agent, the Factors Act would be very little protection to a bona fide purchaser. The question really depends on what in fact happened between the owner and the agent, and if the owner in fact entrusted the goods to the agent, the fact that the agent intended to steal the goods, and so got possession of them by larceny by a trick, is immaterial. The agent is still in possession of the goods with the consent of the owner for the purposes of the

(1) [1899] 1 Q. B. 643, at p. 659.
(2) (1875) L. R. 10 C. P. 354.
(3) (1856) 1 H. & N. 503.
(4) (1863) 1 H. & C. 803.
(5) (1863) 4 B. & S. 270.
(6) (1862) 7 H. & N. 661.

1906

OPPENHEIMER v. FRAZER & WYATT.

Factors Act, and can therefore give a good title to a bona fide purchaser. All that was meant in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) and *Cole* v. *North Western Bank* (2) was that if there was such a trick or fraud as to prevent there being any contract of bailment between the owner of the goods and the mercantile agent, the Factors Acts would not apply. Blackburn J. points out in *Cole* v. *North Western Bank* (3) that "it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser . . . . acquires no title"; but he goes on to say that if the true owner did in fact entrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

As to the other point, Broadhurst was not a partner with Frazer & Wyatt. He got no interest in the diamonds till they had purchased them. The fact that they afterwards chose to credit Broadhurst with a half-share of the profit that they made on a resale is immaterial: *Barton* v. *Williams* (4); *Meyer* v. *Sharpe*. (5) Broadhurst himself cannot be said to have converted the diamonds; he was a mere intermediary through whose hands the diamonds passed from Schwabacher to Frazer & Wyatt. He had no interest whatever in the transaction until after the purchase by Frazer & Wyatt. *Reid* v. *Hollinshead* (6) has no application to the present state of facts.

Rawlinson, K.C., replied.

CHANNELL J. This case raises some very interesting questions under the Factors Act. Now, the first question I have to decide is as to the larceny by a trick. As to that I have had my mind upon the point almost all this week by trying two cases, one without a jury (7) and one with. I gave my judgment upon the one without a jury immediately after the trial of the case because I knew of the other case coming on, and I thought it desirable to give my judgment at once. In that case I came to the

(1) [1899] 1 Q. B. 643, at p. 659.
(2) L. R. 10 C. P. 354.
(3) L. R. 10 C. P. at p. 373.
(4) (1822) 5 B. & Ald. 395.
(5) (1813) 5 Taunt. 74.
(6) 4 B. & C. 867.
(7) See *Oppenheimer* v. *Attenborough*, ante, p. 510.

conclusion that there was not enough evidence of the larceny by a trick in fact, and therefore it was not necessary for me to go at length into the point as to the effect of such a larceny; but at the same time I think I then expressed an opinion that what was quoted to me from the case of *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) was a dictum only, and I thought there had been some misunderstanding about the matter. I am confirmed in that opinion by thinking of it further and by looking carefully at all the cases I can find upon the subject, and I am very clearly of opinion that, although so careful a judge as Collins L.J. there said, "However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, ... he can by his disposition give a good title to the purchaser," nevertheless the inference from that language that if his fraudulent conduct did amount to larceny by a trick it could not give a good title to the purchaser is not correct. What Collins L.J. was then considering was the case of *Cole* v. *North Western Bank* (2), in which Blackburn J. made the statement that undoubtedly led to those observations in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) It appears that that was so, because immediately after the sentence that I have quoted Collins L.J. refers directly to the observations of Blackburn J.

Now the peculiarity of the Factors Acts is this: They were passed for the purpose of validating transactions by mercantile agents. I use that expression although it only comes into the last Factors Act, but it is the result of the decisions upon the former Factors Acts, which practically said that the agent must be a mercantile agent. The object of the Factors Acts, then, was to validate transactions by mercantile agents both in selling and in pledging goods, and one might think, therefore, that the validity of the transaction would probably depend upon the circumstances which took place between that agent and the person who was claiming title by virtue of that agent's acts. It was at one time thought that if it was proved that a man was a factor and had got goods from his principal and then a third party advanced

(1) [1899] 1 Q. B. 643. (2) L. R. 10 C. P. 354.

1906

OPPENHEIMER v. FRAZER & WYATT.

Channell J.

him money on the goods or purchased them from him in good faith and by reason of his carrying on the business of a factor, then that third person obtained a right to the goods by the Factors Acts. That was the business idea of the operation of the Acts, and it was undoubtedly for the purpose of bringing some such result about that the Acts were enacted. But when the earlier Acts are carefully examined all the decisions of the Court shew that the test whether the transaction was valid or not depended, not upon the state of things existing between the person claiming the title and the person whose acts purported to confer it upon him—the supposed factor—but upon the relation which in fact existed between the owner of the goods and the person in the position of a factor. The law on the subject is fully explained in the judgment of Willes J. in the case of *Fuentes* v. *Montis*. (1)

That is the mode in which the Legislature in the former Acts carried out its object, and I have no doubt that it is the mode in which that object is carried out in the Act of 1889. The question depended in the former Acts upon the person who is supposed to have conveyed the title being, in the first place, an agent; in the second place, an agent of a mercantile character, and not a mere carrier, or wharfinger, or servant, and of course he must also be the person entrusted with the goods. Those are all separate decisions of the Courts. Amongst other things, it was held that he need not be an agent for the purpose of a future sale. That is, I think, *Vickers* v. *Hertz* (2) and *Baines* v. *Swainson* (3), where it was held only necessary that he should be an agent in reference to the matter of a sale.

Now in the former Acts it was necessary that the agent should be "entrusted," and entrusted as a mercantile agent, and that is what Blackburn J. was dealing with in the case of *Cole* v. *North Western Bank*. (4) In that case the man in question, one Slee, was a wharfinger as well as a factor, just as he had been in the much older case of *Monk* v. *Whittenbury*. (5) Blackburn J. was pointing out that there must be an entrusting to him as an agent in a mercantile transaction and for the purposes of sale,

(1) (1868) L. R. 3 C. P. 268.
(2) (1871) L. R. 2 H. L. Sc. 113.
(3) 4 B. & S. 270.
(4) L. R. 10 C. P. 354.
(5) (1831) 2 B. & Ad. 484.

and that the goods must be entrusted to him as such an agent. (In the cases of *Heyman* v. *Flewker* (1) and *Baines* v. *Swainson* (2) it was held to be sufficient that the man was employed as a mercantile agent to sell the goods, even although that was not his general business.)

In the course of his judgment in *Cole* v. *North Western Bank* (3) Blackburn J. used these words (4): "So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not 'an agent intrusted' with the possession"; and he instances *Kingsford* v. *Merry* (5) and *Hardman* v. *Booth*. (6)

Neither of those cases, *Kingsford* v. *Merry* (5) and *Hardman* v. *Booth* (6), were cases under the Factors Acts at all; they were cases where it was contended that a title had passed at common law because a title had been obtained from a person who had himself at any rate a defeasible title, and that defeasible title had not been defeated prior to the transactions under which it was claimed that a title had passed. The case of *Kingsford* v. *Merry* (5) was decided one way upon the facts in the Court of Exchequer, and the other way upon the facts in the Exchequer Chamber; and what was pointed out in the Exchequer Chamber was that the transactions with which the Court had to deal there did not pass any property. The fraud in that case was that a man represented to another (that other being a person who had sold goods and not delivered them) that he had bought the goods from the purchaser, and that the purchaser had authorized him to take from them a delivery order. Thus the fraudulent man got possession of the goods by means of the delivery order, not under any contract purporting to be made with him by the person whom he was defrauding, but by a fraudulent misrepresentation that he had made a contract with somebody else; so that the fraud did not relate to any transaction passing the property at all.

The case of *Hardman* v. *Booth* (6) was more or less a similar

(1) (1863) 13 C. B. (N.S.) 519.
(2) 4 B. & S. 270.
(3) L. R. 10 C. P. 354.
(4) L. R. 10 C. P. at p. 373.
(5) 1 H. & N. 503.
(6) 1 H. & C. 803.

1906

OPPENHEIMER v. FRAZER & WYATT.

Channell J.

case. There a man thought he was selling goods to a firm to whose offices he had gone for the purpose of doing it; but the person whom he dealt with there was a person who was a clerk in that firm, but carried on an independent business under the name of another firm, and it was contended that the other firm, to whom the vendor never was intending to sell at all, had got a defeasible title, and could therefore pass it on before it was defeated. But it was pointed out that that firm had no title at all, and that there never was any contract with, or intention to sell to, that firm, but that the intention of the vendor was to sell to the other firm, and that therefore there was not even a voidable contract.

In *Cole* v. *North Western Bank* (1) Blackburn J., after referring to these two cases, goes on: "Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in *Sheppard* v. *Union Bank of London* (2), and afterwards by the Court of Queen's Bench, on the facts, in *Baines* v. *Swainson* (3), that, if the true owner did in fact intrust the agent as an agent,"—"as an agent" are the important words of that sentence—"though he was induced to do so by fraud, a pledge by the agent would be good."

Now it is obvious that what the learned judge was pointing out there was that if there purports to be a contract in fact, although defeasible on the ground of fraud, there is an entrusting; but if there is some trick under which there has been no contract at all, then the thing would be different: it is not voidable, because there is nothing to make void, and nothing to affirm. That is the distinction that he is making.

I do not think there is any other case between that case and the case of *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (4). There a fraud had been committed. The Court assumed that there was there no larceny by a trick. It is pointed out in the arguments by counsel (5) that the Court had not to consider that. Of course *Cole* v. *North Western Bank* (6) came before the learned judges. Then they make the remarks which it is

(1) L. R. 10 C. P. at p. 373.
(2) 7 H. & N. 661.
(3) 4 B. & S. 270.
(4) [1899] 1 Q. B. 643.
(5) [1899] 1 Q. B. at p. 645.
(6) L. R. 10 C. P. 354.

contended are binding upon me. But in that case it was not necessary for them to say that if there had been larceny by a trick the decision would have been otherwise, though that is an inference which can be drawn from the language of Collins L.J.; but he himself bases his observation upon this decision of Blackburn J. in the earlier case, for he immediately follows the remark on which reliance is placed with these words (1): "See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn J. in *Cole* v. *The North Western Bank*." (2)

What Collins L.J. there says, therefore, is not a decision that if there is larceny by a trick the transaction is void. At the outside it is a dictum. But what is the meaning of it? It can only be, as explained by Collins L.J. himself, that the operation of the statute is defeated where there was a trick which would negative there having been any contract of bailment. It has not, therefore, anything to do with its being larceny, or with the intention of the mercantile agent, but there may be such a fraud as would negative there having been a bailment. As where by a trick a man persuades the owner to give him actual possession of goods, the owner believing that he is another person, and therefore that he is entrusting that other person with the goods and not the man who actually gets possession of them. There is no ground for saying there was any fraud of that sort here.

It seems to me that the words of the present Act, "Where a mercantile agent is, with the consent of the owner in possession of goods," mean precisely the same as the former words as to entrusting, with the exception that the present Act brings in the statutory definition of a mercantile agent which previously was only a matter of the decisions of the Courts.

It seems to me that the true rule is that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled; but there may be such a trick as would prevent there being any consent of the owner

(1) [1899] 1 Q. B. at p. 659. (2) L. R. 10 C. P 354.

1906

OPPENHEIMER v. FRAZER & WYATT.

Channell J.

to the particular man having them as a mercantile agent. The facts in *Kingsford* v. *Merry* (1) and *Hardman* v. *Booth* (2), if they applied, might do so; but here there is nothing but a fraud, and a fraud of exactly the same character as took place in *Baines* v. *Swainson*. (3) There the man represented to one firm that he was acting for another firm who proposed to buy the goods, whereas that firm had given him no authority and had been in no communication with him, exactly as was the case here.

The other case which laid down the doctrine in question, *Sheppard* v. *Union Bank of London* (4), was decided on demurrer, and therefore one does not know what the true facts of that case were. But the doctrine is laid down as clearly as it can be that if there is an entrusting to the person in his character of mercantile agent—because it is not necessary that he should carry on that business generally—that then the fact that the entrusting is procured by fraud does not take it out of the statute. It is the nature of the trick, and not the fact that it does or does not amount to larceny, which governs the question.

I am very clearly of opinion that that is the true law, and that Collins L.J. said what he did in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (5) because that passage in *Cole* v. *North Western Bank* (6) was before him, and because he had not to consider the whole question, since it did not apply to the case before him. If this present case should come before him on appeal I expect that he would say, "I was merely protecting myself from giving a decision as to a case which was not before me." That is my view of that point.

I think, therefore, that this finding of the jury that Schwabacher obtained the diamonds by means of larceny by a trick was an immaterial finding.

I perhaps ought to say a few words with regard to this phrase in the Act, "when acting in the ordinary course of business of a mercantile agent." In the present case I told the jury that I thought there was nothing in the evidence to shew that this transaction was not in the ordinary course of business of a

(1) 1 H. & N. 503.
(2) 1 H. & C. 803.
(3) 4 B. & S. 270.
(4) 7 H. & N. 661.
(5) [1899] 1 Q. B. at p. 659.
(6) L. R. 10 C. P. 354.

mercantile agent. If that is wrong there is a misdirection, and the parties can take advantage of it by moving for a new trial on the ground of misdirection. I did not put the question to the jury because I thought that, upon the evidence on both sides, beyond all doubt the transaction between Schwabacher and Frazer & Wyatt was carried out in the ordinary course of business of a mercantile agent.

Now the next question, and the difficult one, is what happens by reason of the finding of the jury that Frazer & Wyatt had established their bona fides, but that Broadhurst, who was so mixed up with Schwabacher, had not established his bona fides. Now, first dealing with that finding on the face of the documents, it is plain from the invoices and the payment that the transaction was between Schwabacher on the one hand and Frazer & Wyatt on the other, but from the first there had been an intention that the transaction should be a purchase on joint account for Broadhurst and Frazer & Wyatt. A purchase on joint account may be very common in mercantile adventures, and it is undoubtedly very common in reference to diamonds. There was not a single witness called who did not say that he had joint account dealings, and it obviously is a very common thing, and no objection is made to an agent employed doing it. What the effect is is a little different. Here Broadhurst himself says that he would have bought the goods himself from Schwabacher only he did not happen to have any money; he took them to Frazer & Wyatt, and brought them an offer from Schwabacher to sell the goods for a certain sum. Then he said: "If you do it I should like this to be as between you and me on joint account"; and they agreed. Now I do not think that after they had bought the goods they agreed to give him a half-share in them; that would be a resale of half by them to him. I think the transaction was that it was intended when they bought, that he should have his half-share of any profit they might make. It does not quite follow that they were joint purchasers, still less does it follow that if Broadhurst happened to be fraudulent they, Frazer & Wyatt, would not get a good title. I think the true effect of the transaction upon the facts is that Frazer & Wyatt bought the diamonds and got the legal

1906

OPPENHEIMER v. FRAZER & WYATT.

Channell J.

property in them, but that they bought them as to half as beneficiaries, and as to the other half in trust for Broadhurst.

Now, if that is the case, is the title of Frazer & Wyatt to the half in which they were beneficially interested defeated by the fact that the person for whom they constituted themselves trustees of the other half was not acting in good faith? I do not think it is. I think they got the legal title, and the beneficial title as to half, and I think, as to their beneficial title as to half, that it is good. On the other hand, I think that as to the title to the other half it is not good. Supposing they had bought the whole as trustees for Broadhurst, and Broadhurst had not been acting in good faith, so that they were only claiming the title for the benefit of Broadhurst, I think it is clear that Broadhurst's want of good faith would have defeated the transaction. On the other hand, if they did not give Broadhurst an interest in the diamonds, his bad faith as agent would not have defeated their title. That being so, it seems to me that they have a good title to the half which they got. I am now trying an action for conversion, and I do not know that it is necessary to say, as to that half, whether they have a good title or not. The general result seems to me to be that I cannot say that Frazer & Wyatt converted the whole or the half or any portion of the plaintiff's goods. They purchased the goods in good faith. I do not think that was a conversion, and I think as they acted in good faith that they are entitled to judgment.

Then what I have said already shews that, at any rate as to half, I think Broadhurst in some shape or another is accountable to the plaintiff. But has he been guilty of a conversion either of the whole or of a part? He took an active part in the transaction which has transferred from the plaintiff, at any rate, half the interest in his property, if not all. I do not think he can be said to be a mere intermediary, and upon the facts, even if he did not know that Schwabacher had really no right to dispose of the goods, he is found by the jury to have had grounds for suspicion, and I think it must be taken that he did suspect that the thing was not altogether right. Under those circumstances he in fact takes part in a transaction which

is certainly inconsistent with the plaintiff's right to the goods, and, as I understand the doctrine of conversion, it seems to me that I must hold that he has converted these goods of the plaintiff. I have a little more doubt as to the whole share than I have as to the half-share, but on the whole I think he is liable for the whole amount as having converted the plaintiff's goods.

The result, therefore, is that there will be judgment for the defendants Frazer & Wyatt, and there will be judgment for the plaintiff against the defendant Broadhurst for the full amount which he claims as the value of the goods.

Judgment accordingly.

Solicitor for plaintiffs: *Julius A. White.*
Solicitor for defendants: *E. Kimber Bull.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1906
Dec. 13.

BAGNALL *v.* LEVINSTEIN, LIMITED.

Employer and Workman—Compensation—"Workman"—Skilled Expert in Business of Employer—Manual Labour incident to Employment—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A man, who had taken a degree in science, entered the employment of a dye and chemical manufacturing company, under a written agreement for five years' service, and upon terms with regard to salary, commission on profits of inventions or improvements in manufacture discovered by him, restrictions as to employment after the termination of his engagement, and disclosure of matters relating to the business of the company and his own researches, applicable to employment as a skilled expert in the business of his employers. His employment involved manual labour on his part. In the course of his employment he met with an accident which caused his death. On an application under the Workmen's Compensation Act, 1897, an award of compensation was made by a county court judge, on the ground that the fact that the man did manual labour brought the case within the Act. On appeal:—

Held, by Collins M.R. and Cozens-Hardy L.J. (Farwell L.J. dissenting), that the governing factor in determining whether the man was a workman within the meaning of the Act was the question what he was employed to do, and that the judge misdirected himself by not taking into consideration the terms of the employment as disclosed in the agreement,

C. A.
1906

BAGNALL
v.
LEVINSTEIN,
LIMITED.

and in treating the performance of manual labour in the discharge of his duties as conclusive that the man was a workman within the meaning of the Act.

Simpson v. *Ebbw Vale Steel, Iron and Coal Co.*, [1905] 1 K. B. 453, applied.

APPEAL from an award of compensation by the judge of the county court of Manchester, under the Workmen's Compensation Act, 1897.

The applicant was the widow of one Ernest Bagnall, and the respondents carried on business as dye and chemical manufacturers. Bagnall entered into the service of the respondents under the terms of a written agreement, which contained clauses to the following effect:—

He undertook by clause 1 (*a*) to give his whole time to serve the company and endeavour to promote the success thereof to the best of his ability, to obey all orders of those in authority in such work as might be allotted to him, and to make a daily report upon the affairs of his department or other work he might be engaged on: (*b*) to live as near the works as possible, so that he might not be prevented from punctually starting his daily occupation: (*c*) to immediately make known to those in authority in every detail, and put at their disposal, the entire results of his work, which were to become the exclusive property of the company, whether they might lead to the improvement of the existing methods of manufacture or might concern the production of new bodies; the company were to be entitled to make use of the work or research and their results as they might think fit, and to patent the methods of improvement of manufacture resulting therefrom in their own name: (*d*) not to endeavour to obtain information relating to any kind of the company's business not entrusted to him, and to keep all affairs relating to the business of the company and his own researches secret: (*e*) contained a restriction as to engaging in the like business without consent for twelve months after the termination of his engagement, and (*f*) a restriction as to making public the methods of manufacture of the company for five years after leaving their service.

The company undertook during the continuance of the agreement, by clause 2 (*a*), to pay Bagnall a yearly salary payable

monthly, commencing at 200*l.* a year and increasing by 15*l.* a year till the fifth year: (*b*) to pay a commission of 4 per cent. on the net profits of such inventions, improvements, or discoveries, as should, in the opinion of the company, be of sufficient merit to justify a patent being taken out, of which the expense was to be borne by the company, and their books were to be conclusive evidence as to the amount: (*c*) to grant an annual holiday of three weeks.

Clause 3 provided for the case of Bagnall being offered a situation during the first twelve months after leaving the company's service, and for payment to him of a proportion of his salary if the company refused to consent to his taking it.

Clause 4 fixed the duration and commencement of the engagement, which was to be for five years, and might be terminated by either side on six months' notice in writing, but if such notice was given by Bagnall he agreed to observe clause 1 (*e*) and (*f*) without being entitled to any compensation.

By clause 5 the agreement was to be in force with the successors in law of the company should any change take place.

By clause 6 Bagnall was to be liable to a fine of 50*l.* for every infringement of the conditions of clause 1.

By clause 7 alterations in the agreement were to be valid only if agreed to in writing.

Bagnall met with his death in the course of his employment by blood poisoning due to chemicals which entered his system through a scratch.

Admissions were made, before the hearing of the application, that Bagnall was a master of science of Owens College, and that he left net estate of 578*l.*, which included 507*l.* 10*s.* insurance money, and a statement of his earnings for the three years previous to his death gave a monthly average of 19*l.* 2*s.*

The manager of the works, who was a doctor of science, was called as a witness, and the judge's note of his evidence was as follows: "Respondents are makers of dyes and chemicals. Deceased employed under agreement put in. He was under my orders. I gave him his daily task. He was employed in sulphur colours. He had to see that the daily manufacture was carried out. He had to do a great deal of manual labour as follows: He turned

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

on steam, put the taps on for blowing over liquor which was in boxes. He took samples and carried them to the laboratory to test and see they were all right. He would, where the colours were delicate and important and expensive or new operations, charge the pan himself. I have been there dozens of times when he did this. He was dressed like common workmen and wore clogs, and he had to do work which soiled his hands, working among the chemicals like other workmen. He was exposed to all the risks to which an ordinary workman is exposed. He was supposed to be present when every batch of material was made. When he was disabled a foreman did his work. He had done no research work whilst there. Cross-examined.—Bagnall had done well at University of Manchester and was master of science. My position is different. I am in superintendence, and do not have to go into the departments to work as a rule, only for special things. I have turned taps on, but I should not do that as manager. I should expect my chemist to do so. When I was a working chemist I used to work like Bagnall, now I do not. The maximum weight of samples would be about 5 lb. The taps he turns are three-inch taps turned with a key. He would also charge batches of material with a scoop, and would have to scoop as much as a cwt. in doing so. I used to do this when I was in his position. It is the work of a skilled foreman. When I was manager of a single department I did similar work. I do not think Mr. Bagnall was the sort of man who would have risen to the position I hold. He was a reliable man, but nowadays higher positions want very high learning. There is a wage-book. Bagnall's name is not in it. Details of salary such as his are in town. It was not with us because ours is a weekly wage-book. Those who prefer to have it weekly are in our book. Some chemists who draw more than deceased did are in the wages book. Bagnall was paid monthly. By myself.—His normal hours were from 9 to 6, but if required he worked to 8 or 10. On some occasions he was there all night looking after a process in the works. He had no office work. He was five-sixths of his time in the works and perhaps one-sixth in the laboratory. The ordinary workmen, such as labourers, are there from 6 to 8.30, from 9 to 1 and from 2 to 5. Foremen are about 7 to 7.30, and

then as long as required in the same way as deceased, only they come an hour and a half earlier. Workmen such as labourers get overtime, but not foremen."

The county court judge, in giving judgment, stated that he had come to the conclusion that in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1) all that the decision came to was a refusal to interfere with the findings of a county court judge on certain facts, and that it had no bearing on the decision of the case before him. He regarded it as irrelevant whether a man was a master of science, a doctor of divinity, a master of arts, or president of the Royal Academy. It seemed to the learned judge that if the man did manual work within works he thereby earned his living in a way that brought him within the Act. The deceased was employed as a chemist, and it was clear from the evidence that he was employed in making mixtures, turning steam pipes with taps, and that he worked the bulk of his time in the works, and was as much exposed to danger as any workman earning a pound a week, and probably more so, because he had to deal with vats full of poisonous liquids, to lean over them, and to deal with them in a manual way. The deceased was paid and employed as a workman, a skilled workman and worth a skilled wage, but just as much a workman as any man who carried a hod or handled chemicals. He consequently held that the deceased was a workman within the meaning of the Act, and made an award in favour of the applicant.

The employers appealed.

C. A. Russell, K.C., and *J. Addington Willis*, for the employers. The principle of construction laid down by the Court of Appeal in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1), that the Act does not apply to anyone who cannot, in the ordinary sense of the term, be described as a workman, covers this case. The opinions of the Law Lords in *Hoddinott* v. *Newton, Chambers & Co.* (2), shew that this is not a mere question of fact, but that when the facts are found it is a question of law whether they bring the case within the Act. It was for the county court judge to find the facts, and then to determine the inference of law to

(1) [1905] 1 K. B. 453. (2) [1901] A. C. 49.

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

be drawn from them as to whether the man was a workman within the meaning of the Act or not. What he did was to decide that because the deceased did some manual labour he must have been a workman within the meaning of the Act, and in so treating the case he misdirected himself. The "real and substantial business" of the deceased, to use the words of Lord Esher in *Morgan* v. *London General Omnibus Co.* (1), was the use of the skill and knowledge that he had acquired. In doing this he would have to use his hands, but the difference between manual work and manual labour was pointed out by A. L. Smith J. in *Cook* v. *North Metropolitan Tramways Co.* (2) This case resembles that of *Jackson* v. *Hill* (3), in which the Court held that a man engaged under a written contract not to do ordinary mechanical work, but to employ his mechanical knowledge in assisting his employers, was not a workman within the Employers and Workmen Act, 1875. So in *Hunt* v. *Great Northern Ry. Co.* (4) a man whose primary duty was to use his intelligence, and not his hands, was held not to be a workman within the same Act. The terms of the agreement are inconsistent with the application of the provisions of the Act of 1897 in many respects, as for instance in that of salary, which was a yearly one, and would continue during temporary incapacity. The man was not in a state of dependence, and he had insured himself. In effect he was not within the class that an ordinary person would describe as workmen, and the judge was wrong in saying that there was no principle in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (5) applicable to the case.

Ruegg, K.C., for the applicant. The arbitrator had to decide whether the deceased was a workman, and his decision to that effect is not open to review. The definition of workman in the Act is wide enough to cover this case, for the deceased was a person engaged in an employment to which the Act applies; it is proved that he had to do manual labour, and the definition covers agreements whether oral or in writing. The cases cited under the former Acts as to workmen turn on the words of

(1) (1884) 13 Q. B. D. 832, at p. 834.
(2) (1887) 18 Q. B. D. 683.
(3) (1884) 13 Q. B. D. 618.
(4) [1891] 1 Q. B. 601.
(5) [1905] 1 K. B. 453.

definition in the Employers and Workmen Act, 1875. The definition in the Workmen's Compensation Act was intended to do away with the restricted definition of the former Act, and the Legislature adopted a new and wider definition of "workman." In *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1) the man whom it was sought to treat as a workman was the certificated manager of a coal mine, an official whose appointment was necessary by statute. The county court judge had found that such an official was not a workman, and the Court declined to say that the decision of the judge was wrong. In this case there is a balance of evidence, and the judge was entitled to find on the facts either for or against the applicant. It is only possible in such a case to upset the finding of the judge by saying that he has misdirected himself, and of that there is no evidence. He had before him evidence that five-sixths of the man's time was employed in manual labour and one-sixth in the laboratory, and that he had done no research work. In those circumstances the decision of the judge is not open to review.

COLLINS M.R. There is no doubt that this case presents some difficulties, for the reasons that were given in the earlier decision in this Court in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1), in which we had to determine whether the certificated manager of a coal mine was a workman within the Workmen's Compensation Act, 1897. In the present case a man was employed by a company on the terms of a written agreement, and after about four years in their employment he met with an accident which resulted in his death, and if he was a workman within the meaning of the Act the applicant is entitled to the compensation awarded by the learned county court judge.

The question before the learned judge was whether, having regard to the terms of the agreement and the work that he was doing under it, the deceased came within the term "workman" as used in the Act.

The man's position was exceptional, because he was engaged under the terms of a written agreement of a complicated

(1) [1905] 1 K. B. 453.

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

Collins M.R.

character. He was a graduate of Owens College, and had taken a degree in the department of science. The agreement was for a term of five years, but either party could cancel it by giving six months' notice. It contained undertakings on his part to give his whole time to the service of the company, and to endeavour to promote the success thereof to the best of his ability, to obey all orders of those in authority in such work as might be allotted to him, and to make a daily report. He was to live as near the works as possible so that he might not be prevented from punctually starting his daily occupation. By another clause he was "to immediately make known to those in authority in every detail, and put at their disposal, the entire results of his work, which at any time become the immediate and exclusive property of the company, whether the same may lead to the improvement of the existing methods of manufacture, or whether they concern the production of new bodies. The company is entitled to make use of the said work or researches and their results as they think fit, and to patent the methods or improvements of manufacture resulting from the said researches in their own or any other name if they consider this advisable." He was to keep all affairs relating to the business of the company and his own researches and their results secret. There was a limitation as to his engaging in similar employment for twelve months after the termination of his engagement without the express consent of the company, and a similar limitation for the longer period of five years upon his making public the methods of manufacture of the company. On the other hand, the company were to pay a salary of 200*l.* for the first year, increasing by 15*l.* yearly, and reaching 260*l.* in the fifth year. They were also to pay him a commission after the rate of 4 per cent. of the net profits of all such inventions, improvements, or discoveries as the company might patent. The company were to grant him an annual holiday of three weeks, and there were provisions as to payment of half salary if, in the first twelve months after leaving the company's service, the company did not consent to his accepting a situation offered to him. There was provision for a fine of 50*l.* for every infringement of the conditions to be observed by him under the first clauses of the agreement. From

the notes of the learned judge it appears that the deceased did manual labour described as turning on steam and putting the taps on for blowing over liquor in process of manufacture; that he took samples and carried them to the laboratory to test; that in certain operations he charged the pan himself; and that he was five-sixths of his time in the works. Upon this state of things the learned judge decided that the fact that the man was a master of science was immaterial, and that he was as much a workman as any man who carries a hod, so that the applicant was entitled to an award of compensation.

We have been pressed in argument with the difficulty that the question before the learned judge was one of fact on which he has decided, and that this Court has no jurisdiction to interfere with his decision. But as has been pointed out repeatedly in this Court, and has received the sanction of the House of Lords (1), the question in such a case is a mixed one of law and fact, and when the facts are found it is a question of law whether they bring the case within the Act. The question whether the learned judge has correctly applied the law to the facts that he has found depends upon the terms of the agreement and the meaning to be attached to the term "workman" as used in the Act. Upon this latter point I have nothing to add to the judgments given in this Court in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (2). They may not contain a definition of the term, but they contain a principle which might have assisted the learned judge. The root of the matter is that each case must be decided in view of that which the person whom it is sought to treat as a workman was employed to do. The learned judge has not dealt quite fairly with the argument as to this man being a master of science. It is true that a person of that description may be employed as a workman, but the governing factor is whether he was employed as a master of science, to get the benefit of his attainments, and if the true inference from the facts is that this was the main purpose of the employment the case is not prima facie one of employment as a workman, even though the man has to do some manual labour in putting himself

(1) *Hoddinott* v. *Newton, Chambers & Co.*, [1901] A. C. 49.

(2) [1905] 1 K. B. 453.

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

Collins M.R.

in a position to give his skilled service. The case of *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1) reaffirms the position that the popular meaning must be given to the term "workman," and to call a skilled expert a workman is to travel out of the ordinary meaning of that term. The matter was considered in a case which may be usefully used as an illustration—*Jackson* v. *Hill.* (2) That case arose, not under the Workmen's Compensation Act, but under the Employers and Workmen Act, 1875. The plaintiff was employed by a firm in the terms set out in the head-note, "to assist the firm as a practical working mechanic in developing ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them." He was put to do a class of work which he considered did not come within the agreement, being given the work of an ordinary mechanic. He objected and declined to do this work, and proceedings were taken before magistrates to make him amenable to the Act. The question before them was whether he was within the Act, and they decided that he was and convicted him. The matter came before the Queen's Bench Division on appeal, and the learned judges decided that the conviction was wrong, upon the ground of the distinction between the class of workman indicated in the agreement and an ordinary workman. On the true view of the agreement in the present case it is open to the same argument. In substance the employers intended to avail themselves of the man's skill, and to bring that into action they supplied him with work, so that he should have the opportunity of applying that skill for his own benefit and theirs. The whole terms of the agreement seem to me to confirm this view. The stipulations as to salary, commission, discoveries of which the employers were to take the benefit, and in fact, without going through them, the whole terms of the contract point in that direction, and, taking the whole of them into consideration, it seems to me impossible to describe the man as a workman, using that term in its ordinary sense. It is true that he did work which, but for the agreement, might have indicated that he was

(1) [1905] 1 K. B. 453. (2) 13 Q. B. D. 618.

an ordinary workman, but on the face of the agreement it appears that that was not the true position.

The learned judge had to consider, not merely the facts of the case, but the law bearing on them, and the question before us is whether he has misdirected himself in law. The key to the position taken up by the learned judge is to be found in his statement that if the man did manual work within works he thereby earned his living in a way that brought him within the Act. With great respect for the learned judge this seems to me to be a misapprehension of the significance of that which is really the governing matter, namely, the question what was the man employed to do. Was he employed as a workman or as a skilled adviser? If the latter, the mere fact that in carrying out his engagement he did manual labour would not turn him into a workman. The conclusion at which I have arrived is that the learned judge misdirected himself, and that there must be a new trial.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons. There has been no suggestion that the employment of the deceased man was otherwise than under the written agreement, and that confines us to a consideration of the terms of the agreement. It seems to me that under those terms the man was not an ordinary workman, but a skilled expert. It is true that in the discharge of his duties as a skilled expert it might be usual and necessary to employ his services in the doing of some manual work. That, however, was not the primary object of his employment. According to the evidence of the manager of the works, the man was employed in sulphur colours, and had to see that the daily manufacture was carried out. In doing this he had to turn on taps, to take samples to the laboratory, and in exceptional circumstances to charge the pan. Those were just the special operations in which the assistance of a skilled person was required. The learned judge based his judgment on the fact that the man did this manual labour, and treated that fact as sufficient to bring him within the term "workman" in the Act. In my opinion that is not the right view, for the learned judge has omitted to apply to this case the

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

principle that underlies the decision of this Court in *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (1), a decision which did not, as the learned judge seems to have thought, depend simply upon the question whether the Court would or would not interfere with the finding of the arbitrator upon the facts of that particular case.

FARWELL L.J. I regret to find myself in disagreement with the other members of the Court, but I am unable to see that there was any mistake or misdirection on the part of the county court judge. It appears to me that he meant by his decision that work such as that done by the deceased, of which five-sixths was manual and perhaps one-sixth work in a laboratory, brought the man within the Act as a workman. In this I can see no mistake or misdirection.

But I go further, and agree with the conclusion at which the learned judge arrived. The interpretation of the word "workman" no doubt gives rise to difficult questions, and the Legislature has shrunk from defining it, and has only said that it includes every person who is engaged in an employment to which the Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is express or implied, is oral or in writing. In the present case there is an agreement in writing for service by a man who is a skilled workman. I should be loath to say that education is a bar to success in a claim for compensation under the Act. In my view the consideration whether the applicant is a gentleman, or whether his education is good or bad, is not relevant. The case does not, in my opinion, turn so much on the construction of the agreement, though that is an important matter to consider, as on the work that was done by the deceased under it. In the agreement the undertaking of the deceased to obey all orders of those in authority in such work as might be allotted to him is put in the forefront of the matter. That certainly is a usual stipulation with regard to the employment of an ordinary workman. Inasmuch as in a chemical

(1) [1905] 1 K. B. 453.

factory the persons working there have an opportunity of making discoveries, provisions are inserted to prevent the person employed from divulging the business affairs and methods of his employers. These provisions are not, to my mind, inconsistent with employment as an ordinary workman, a workman of intelligence, but still a workman within the meaning of the Act. The clauses containing restrictions as to employment in or carrying on a like business for a certain time after the expiration of the agreement are common enough. The clause as to commission relates only to inventions that may be patented, and the provision as to fines is to enforce the restrictive clauses of the agreement. Under this agreement the man might be employed in such a way as to be a mere workman or he might be something more, and which he was must depend on the event. If he had been found sufficiently skilful to be employed in the laboratory, he might have been withdrawn from manual labour, but this, as appears from the evidence of the manager, was not the case. That evidence is that when the man was disabled a foreman did his work, and that he had done no research work during the whole time that he was there; for certainly five-sixths of his time he was working as an ordinary, though skilled, workman. The hours that he worked and the salary that he received appear to me to make no difference, and there is in my opinion nothing in the terms of the agreement which overrides the fact that the man was doing, for the greater part of the time, work which would be done by an ordinary workman. With regard to the case of *Jackson* v. *Hill* (1), that was a decision under the Employers and Workmen Act, 1875, depending on the definition of a workman contained in that Act, but it might well be that a man in the position of the plaintiff in that case would be a workman within the Act that we have to deal with. The case of *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.* (2) is distinguishable from the present case, for the man was the certificated manager of a coal mine and did no manual labour.

In my opinion the finding of fact by the learned judge that the deceased was a workman and entitled to the benefit of the

(1) 13 Q. B. D. 618. (2) [1905] 1 K. B. 453.

C. A. 1906

BAGNALL v. LEVINSTEIN, LIMITED.

Act was correct, and if it depended on my view of this case the appeal would fail.

Appeal allowed: new trial ordered.

Solicitors for applicant: *Rawle, Johnstone & Co., for Russell, Coppock & Helm, Stockport.*

Solicitors for employers: *William Hurd & Son, for Chapman & Brooks, Manchester.*

A. M.

C. A. 1907 *Feb. 7.*

[IN THE COURT OF APPEAL.]

BURR *v.* THEATRE ROYAL, DRURY LANE, LIMITED.

Master and Servant—Common Employment—Actress Engaged at Theatre—Implied undertaking of Risks of Employment—Negligence of Fellow Employee—Burden of Proof—Construction of Contract.

The plaintiff was engaged by the defendants, a theatre company, to perform in the chorus in a pantomime. On the close of a performance, the plaintiff was, in leaving the stage, passing by a place where scene-shifters were shifting the scenery, when she was injured by something which fell on her head. At the trial of an action brought by the plaintiff against the defendants to recover damages in respect of the injury so occasioned to her, evidence was given for the plaintiff of the above facts, but there was, in effect, no further evidence to shew how, or by whose negligence, the accident was caused:—

Held, that the case came within the rule that a person employed impliedly undertakes, as incidental to his employment, the risk of negligence on the part of a fellow employee engaged in the same employment, and that, inasmuch as the plaintiff had adduced no evidence to shew that the accident had been caused by the negligence of the defendant company, or of any person for whose negligence they would be responsible, the action was not maintainable.

A clause in a written contract of employment, providing that, notwithstanding anything contained in the Employers' Liability Act, 1880, the employer shall not be liable to the employee for injury occasioned to him through the negligence of any person in the service of the employer, who is entrusted with superintendence, or to whose orders the employee is bound to conform, does not rebut the legal implication that the employee undertakes the risk of negligence by any fellow employee in the same employment.

APPLICATION for a new trial in an action tried before Grantham J. with a jury.

The action was for damages for personal injuries.

The plaintiff was engaged by the defendants, under an agreement in writing, which was on a printed form headed "Agreement engaging Artiste," to take part in the chorus in the Drury Lane pantomime of 1904—1905. By clause 1 of the agreement the defendants (therein called "the company") engaged the plaintiff (therein called "the artiste") at a salary of 1*l.* per week, to include seven performances, i.e., six evenings and one morning"; and a further salary as therein mentioned for each additional morning performance, "according to the custom of playhouse pay, that is, for such days and nights only as the theatre in which the artiste is playing shall be open for theatrical performances under the management of the company; the artiste to rehearse and perform to the best of her skill and ability at the said theatre, or any other theatre or place of amusement, as often as she shall be warned to do so by the company, or any other person or persons duly authorized by the company on its behalf (all such persons being included in the term 'the management' hereafter used), or by notice in the bills of the day or newspapers; the company also paying the third-class railway fares to and fro of the artiste when she may be required to perform away from the theatre she is playing at, and the artiste shall travel by such train or other conveyance as the management may appoint." By clause 2 the engagement was to commence on the opening performance of the pantomime, but the artiste was bound to attend previous rehearsals as mentioned in the annexed rules. By clause 4 certain rules and regulations annexed to the agreement were incorporated with and were to form part of it. By clause 6 the artiste was not, without the consent of the company, to assign or charge her salary. By clause 8, "notwithstanding anything contained in the Employers' Liability Act, 1880, or any Act continuing or amending the same, the artiste shall not, nor shall the artiste's legal personal representative in case of the said artiste's death, have any right of compensation or any remedy whatever against the company in respect of any personal injury which may be caused to the artiste by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in or about the Theatre Royal Drury Lane, or any other theatre or place of amusement wherein the artiste may perform under this agreement;

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

or by reason of the negligence of any person in the service of the company at the said Theatre Royal Drury Lane (or any such other theatre or place of amusement as aforesaid), who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or by reason of the negligence of any person in the service of the company to whose orders or directions the artiste at the time of the injury was bound to conform, and did conform, where such injury may result from her having so conformed; or by reason of the act or omission of any person in the service of the company done or made in obedience to the rules or by-laws of the company, or in obedience to particular instructions given by the management." By clause 10, after four weeks' run, one week's notice was to be considered sufficient notice for the termination of the agreement on the company's side only. The rules and regulations annexed to the agreement contained various provisions with regard to the conduct of, and prohibiting the doing of certain things by, persons engaged as performers in the theatre and at rehearsals, and imposing penalties for breach of those provisions. Rule 27, under the sub-head "rules during performance," provided that "any person going on or off the stage at any other time or place, or in any other situation, than that settled at rehearsal, or leaving the stage before the proper exit, or neglecting to wear the dress fixed on by the company, or wearing apparel inconsistent with the character represented, or for creating unnecessary noise or disturbance behind the scenes or in the dressing rooms, shall forfeit one-seventh of a week's salary."

Evidence was given on behalf of the plaintiff to the effect that on a certain day she was performing at the theatre at a matinée as one of the chorus in the pantomime. Part of the costume which she wore was a helmet, with a ball on the top of it. Inside the helmet, from the lower part of the ball, projected a sort of spike. The curtain had come down at the end of the performance, and the plaintiff and other members of the chorus were leaving the stage to go to their dressing rooms. In so doing they had to pass along by the side of the "wings," where the scenery was being shifted by the scene-shifters; and, while the plaintiff was so passing, a crash as of breaking glass was

heard, and something fell on the plaintiff, which drove the helmet with the before-mentioned spike down on her head, and she was seriously injured. There was no direct evidence as to the cause of the accident, or as to what had fallen; but one of the other members of the chorus, who was called for the plaintiff, said that a person whom she described as the defendants' manager had stated to her that the accident happened through the fall of a piece of old scenery which had been left by mistake in the dock (a recess at the side of the stage where scenery in use was kept) for some years, and not through the fall of glass. There was no evidence as to the precise relation which the person in question bore to the defendants. At the conclusion of the plaintiff's case it was submitted on behalf of the defendants that, the negligence which caused the accident being the negligence of the scene-shifters or others who were engaged in a common employment with the plaintiff, the action was not maintainable. Grantham J. assented to that contention, and directed judgment to be entered for the defendants.

Hume Williams, *K.C.*, and *J. R. Atkin*, *K.C.* (*L. L. Yeatman* with them), for the plaintiff. There was no direct evidence as to the precise manner in which the accident happened, but, on the principle res ipsa loquitur, there was evidence that it was occasioned by negligence, for which the defendants are prima facie responsible. It was, under these circumstances, for the defendants to shew that the negligence by which it was caused was that of a person who must be considered as the fellow servant of the plaintiff, and not negligence for which the company would be responsible, e.g., that of the directors of the company. It is submitted that, even on the assumption that the plaintiff was in the defendants' service, the evidence as to the admission made by the person described as the defendants' manager was some, though no doubt slight, evidence, which ought to have been left to the jury, of negligence on the part of the management itself in allowing a dangerous state of things to exist, as regards the condition of the theatre, for which the defendants would be responsible. Assuming, however, that the negligence was presumably that of the persons employed in shifting the

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

scenes, they were not fellow servants of the plaintiff within the doctrine of common employment. The nature of the plaintiff's agreement with the defendants did not bring her within the scope of that doctrine. The terms of the agreement shew that the plaintiff was not employed as a servant of the defendants, but contracted with them as an artist to exhibit her skill as an actress and dancer at the theatre. It cannot be said that the various performers who in like manner are engaged at places of entertainment, such as theatres or music-halls, to exhibit their art, or skill, are all servants of the proprietors within the doctrine of common employment. A leading actor or singer could not be considered as the servant of the manager of the theatre, and, though the plaintiff, it is true, is engaged in a much humbler capacity, the relation is of the same kind in her case. The proprietors of the theatre could not, it is submitted, be held liable for negligence on the part of a performer so engaged occasioning injury to one of the audience. It is not sufficient, moreover, for the purposes of the doctrine of common employment that the person injured and the person by whose negligence the injury is caused are engaged by the same person and in furtherance of the same object, namely, in this case, the production of the pantomime. The employment in which both are employed must be so far identical as to lead clearly to the implication that they undertook the risk of one another's negligence as incidental to their employment.

[Collins M.R. referred to *Seymour* v. *Maddox*. (1)]

It is contended that the scope of the respective employment of the artists and the scene-shifters employed at a theatre is so far different for this purpose that it cannot be reasonably implied that the artists agreed to take the risk of the scene-shifters' negligently causing something to fall on them while engaged in the theatre. [They cited on this point *Johnson* v. *Lindsay & Co.* (2); *Smith* v. *Steele* (3); *Priestley* v. *Fowler* (4); *Bartonshill Coal Co.* v. *Reid* (5); *The Petrel* (6); *Charles* v. *Taylor*. (7)]

(1) (1851) 16 Q. B. 326.
(2) [1891] A. C. 371.
(3) (1875) L. R. 10 Q. B. 125.
(4) (1837) 3 M. & W. 1.
(5) (1858) 3 Macq. 266.
(6) [1893] P. 320.
(7) (1878) 3 C. P. D. 492.

There is a further point which arises on the terms of the particular contract in this case. The applicability of the doctrine of common employment depends on an implication that the person injured has agreed to bear the risk of negligence on the part of fellow employees. Where there is an express stipulation that the employer shall not be liable to the employee for the negligence of certain of the fellow employees, as there was in clause 8 of the contract in this case with regard to the negligence of servants having superintendence, that must rebut the implication of any other stipulation directed to the employer's non-liability for the negligence of fellow servants generally, including that of such servants as the scene-shifters, on the principle " expressio unius alterius exclusio."

Clavell Salter, K.C. (*Longstaffe* with him), for the defendants. Clause 8 of the contract cannot possibly have the effect attributed to it by the plaintiff's counsel. On the contrary, it goes to shew that the doctrine of common employment was intended to apply to the contract between the parties. The Employers' Liability Act, 1880, introduced certain exceptions from that doctrine. The contract here is on a common form, intended to be used in the cases of various kinds of artists, and clause 8 is introduced in order to provide that, in case it should happen that any of them for any reason should come within the scope of that Act, the exceptions from the doctrine of common employment thereby created shall not apply, and the position of the employers shall remain as it would have been at common law. That clause can have no direct application to the case of the plaintiff, whose employment does not come within the scope of the Employers' Liability Act, 1880. The doctrine of common employment has been applied to cases of seamen, where there must be written contracts of service: *Searle* v. *Lindsay* (1); *Hedley* v. *Pinkney & Sons Steamship Co.* (2) The written contract here is in no way inconsistent with the implication that the plaintiff took upon herself the risk of the negligence of fellow employees in the same employment.

The plaintiff was clearly in the employment of the defendants within the meaning of the doctrine of common employment:

(1) (1861) 11 C. B. (N.S.) 429. (2) [1894] A. C. 222.

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

Morgan v. *Vale of Neath Ry. Co.* (1) The doctrine res ipsa loquitur does not help the plaintiff in this case, for, assuming that there was evidence of negligence, taking it most favourably for the plaintiff, it was equally consistent with its being negligence for which the defendants were not, as with its being negligence for which they were, responsible: see *Allen* v. *New Gas Co.* (2) The plaintiff's evidence shewing that she was in the defendants' employment, the onus lay upon her of shewing that the injury complained of arose from some negligence for which they were responsible, i.e., the negligence of the defendants themselves or some person, other than a fellow servant of the plaintiff, for whose negligence they were responsible, if such there could be. She altogether failed to support that onus; on the contrary, the evidence adduced for her shewed that presumably her injuries were caused by the negligence of fellow servants. It is clear that the risk which she incurred was one incidental to the employment, and one, therefore, which she must be inferred to have undertaken.

[He was stopped.]

COLLINS M.R. This is an appeal from the decision of Grantham J., who, in an action brought by the plaintiff to recover damages for personal injuries, directed judgment for the defendants at the close of the plaintiff's case.

The plaintiff was engaged by the defendants to take part in the chorus in the Drury Lane pantomime under an agreement in writing, the most material clauses of which appear to be Nos. 1 and 8. [The Master of the Rolls then read those clauses.] What happened was this. Part of the plaintiff's dress was a helmet, which had a ball on the top of it, and inside, from the lower part of the ball, projected a spike of metal, more or less pointed. After a performance was over, and the curtain had fallen, while the plaintiff, in leaving the stage, was passing by a place where some scenery was being shifted—from what cause was never really proved—a noise as of breaking glass was heard, and something fell upon the plaintiff, with the effect that the helmet with the spike in it was driven down on the plaintiff's head, and she was

(1) (1865) L. R. 1 Q. B. 149. (2) (1876) 1 Ex. D. 251.

seriously injured. The learned judge held that the plaintiff had not established any claim against the defendants for damages for negligence. He was of opinion that, having regard to the nature of the plaintiff's engagement with the defendants, and the circumstances of the case, the doctrine of common employment was applicable, and that the plaintiff could not recover, because by that doctrine she was debarred from claiming damages for injury occasioned to her by the negligence of any person who could be described as her fellow servant.

Assuming that the learned judge was right in holding that the plaintiff's engagement with the defendants brought her within the scope of the doctrine of common employment—a matter with which I will deal presently—the question arises whether any evidence was given for the plaintiff of negligence causing the injury on the part of any person, not coming within the description of a fellow servant, for whose negligence the defendants could be responsible. In my opinion there was not. The only piece of evidence which was said to be to that effect was the admission stated by another member of the chorus to have been made by some person, whom she called the defendants' manager, but whose precise position was never proved, that the accident had not been caused by a fall of glass, but by the fall of an old piece of scenery which had been left where it ought not to have been. It was urged that this constituted evidence sufficient to raise a question for the jury as to whether negligence had not been brought home to the management of the theatre itself, for which the defendants would be responsible. But, taking that statement at the highest, I do not think that it amounts to any evidence of negligence on the part of the defendants or of any person, other than a fellow servant, for whose negligence they could be responsible to the plaintiff. In my opinion the evidence did not point to negligence by any persons but fellow employees of the plaintiff; and there was no evidence of negligence on the part of the defendants, or of any person in respect of whose negligence the plaintiff would, on the before-mentioned assumption, have any ground of action against them.

That being so, the question is whether the learned judge was right, under the circumstances, in holding that the doctrine of common employment applied to the case. I am of opinion that

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

Collins M.R.

he was clearly right in so holding. I think that this case comes within the principle which is the basis of the doctrine of common employment. In dealing with this question I will, in the first place, read a passage from the judgment of Lord Herschell in *Johnson* v. *Lindsay & Co.* (1), where he cited observations made by Lord Cairns in *Wilson* v. *Merry* (2), some of which appear to me to have a bearing on the question raised in the present case. He said: "The language used by Lord Cairns in *Wilson* v. *Merry* (2) was much pressed upon your Lordships. It appears to have been supposed to countenance a wider exemption than is to be deduced from the other authorities to which I have referred. Lord Cairns, in delivering his opinion in this House, said: 'I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds.' But it is clear to my mind that, when Lord Cairns used this language, he was only intending to repudiate the contention put forward by the appellant in that case, that the rule applied exclusively to workmen of the same grade actually employed in a common labour, and had no application where the person whose negligence was complained of was in the position of a manager not taking part in manual labour, who was in fact the employer's alter ego. Other passages in the noble and learned Lord's opinion indicate, I think, clearly that he did not intend to state the law differently from Lord Cranworth, whose opinion in the *Bartonshill Coal Co.* v. *Reid* (3) he quotes with approval." There is one other passage to which I will refer, as illustrating for the purposes of the present case, the basis of the doctrine of common employment. It

(1) [1891] A. C. 371, at p. 378.

(2) (1868) L. R. 1 H. L. Sc. 326, at pp. 331, 332.

(3) 3 Macq. 266.

is from the judgment of Brett L.J. in *Charles* v. *Taylor* (1), where, in discussing the principle upon which, if a servant is guilty of negligence causing bodily harm, his master is held liable to a stranger, but not to a servant engaged in a common undertaking with that other servant, he said: "I shall now enunciate one principle relating to the question: I do not say there may not be more. It is this—when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other." That is a clear statement of the circumstances under which the immunity of the employer in such cases attaches. Although, however, in this connection, the terms "master and servant" and "common employment" are convenient expressions to use in a general way, as indicating the conditions under which the principle involved is very commonly applicable, it seems clear from the authorities that they must not be taken as limiting its application to cases where the person injured and the person whose negligence has caused the injury are both in the position of "servants" in the ordinary sense of the term. It appears to be on the same principle, really, that a guest, who has come upon premises at the invitation of his host, cannot, at any rate in the absence of anything in the nature of a trap, be heard to complain of the condition of affairs on the premises to which he has been invited, or of the negligence of his host's servants, whereby he is injured, because he has impliedly undertaken the risks which may be incidental to his acceptance of his host's invitation. This is the view which was taken in the case of *Southcote* v. *Stanley* (2) by Pollock C.B., who, after stating the reason for the rule with regard to fellow servants, as being that the servant undertakes to run all the ordinary risks of the service, including those arising from the negligence of his fellow servants, said that the same principle applied to the case of a visitor at a house. The basis underlying the doctrine of common employment in all the

(1) 3 C. P. D. 492, at p. 496. (2) (1856) 1 H. & N. 247.

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

Collins M.R.

cases appears to be that, under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. The principle so stated affords an answer to the argument which has often been introduced in these cases, namely, that the person injured is not in the same grade of employment as the person whose negligence occasioned the mischief. That argument appears to be based upon a misconception of the true principle which governs these cases. There may be such a difference between the relative positions of two persons employed by the same employer as to make it plausible to say that they cannot be considered as fellow labourers. But that consideration does not determine the question really involved, which is whether the possibility of negligence on the part of the person who has occasioned the mischief is not one of the risks which, under the circumstances, must be taken to have been accepted by the person injured as incidental to the employment. It was in pursuance of the principle to which I have alluded that in the case of *Hedley* v. *Pinkney & Sons Steamship Co.* (1), where a seaman lost his life through the negligence of the captain of the ship, it was held that, although the captain was in a position of absolute superiority to the seaman, nevertheless the so-called doctrine of common employment applied, and the representatives of the seaman had no claim for damages against the shipowners in respect of the negligence of the captain, because the inference was that the seaman must be taken, under the circumstances, to have accepted the risk of negligence on the captain's part. These considerations appear to me to be an answer to the plaintiff's claim, so far as the case depends upon the general law applicable to cases of this kind. I think that, under the circumstances of the present case, the plaintiff must, as between herself and her employers, be taken to have accepted the risk of negligence on the part of any person who could be described as a

(1) [1894] A. C. 222.

fellow employee, and that there was no evidence that her injuries were occasioned by the negligence of any person not coming within that category.

An ingenious point was, however, taken by Mr. Atkin for the plaintiff upon the terms of the particular contract in this case. He said that, having regard to clause 8 of the contract, which is undoubtedly aimed at the limitation of the defendants' liability to an employee in respect of negligence of their servants, and to the principle of construction by which, where there is an express stipulation in a written contract dealing with a certain subject-matter, any other stipulation with regard to the same subject-matter cannot be implied, on the ground that expressio unius is alterius exclusio, the implication upon which the doctrine of common employment rests was in the present case excluded. It seems to me that the principle upon which Mr. Atkin thus relied does not really apply to the present case. The observations of Lord Cairns in *Wilson* v. *Merry* (1), to which I have referred, shew that the doctrine of common employment is only an example of the rule, and not the rule itself. The argument is that, the doctrine of common employment being based on an implication introduced into the contract between employer and employed, where there is a written contract containing an express stipulation exempting the employer from liability to the employee for the negligence of certain of his servants, an implication exempting him from liability to the employee in respect of the negligence of his servants generally is not admissible. I think that this argument pushes the idea of implication in this connection too far. That idea has, in relation to this subject, been introduced in the attempt to analyse the grounds of a well-established rule of law. We are here dealing with a positive rule of law with regard to the relation of employer and employed, which is really based upon considerations incidental to that relation rather than on any actual intention inferred to have existed in the minds of the parties in the particular case. It is a fundamental principle of law, except where the Legislature has provided to the contrary, that, wherever the relation of employer and employed exists, there is this limitation of the

(1) L. R. 2 H. L. Sc. 326.

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

Collins M.R.

liability of the employer as regards injury occasioned by the negligence of a fellow servant. That is the rule of law which applies to contracts of employment, whether written or unwritten, at any rate unless it is expressly excluded by the terms of the contract; and I do not think that it can fairly be said to be excluded, because there is an express stipulation in the contract as to the liability of the employers with reference to the provisions of the Employers' Liability Act, 1880, which is quite consistent with the existence of the ordinary rule of law with regard to the present case. For these reasons I think that the application for a new trial must be refused.

COZENS-HARDY L.J. I am of the same opinion for the same reasons. I think that on the main point involved the case of *Seymour* v. *Maddox* (1) is a strong authority in favour of the view taken by the learned judge at the trial. With regard to the second point, namely, that based upon clause 8 of the agreement I was at first somewhat impressed by the contention of the plaintiff's counsel, but on further consideration I have come to the conclusion that it is not well founded. The clause is contained in a common form of agreement, intended to be used with regard to employees whose duties may be of various kinds, and who in some cases, it might be thought, would possibly come within the scope of the Employers' Liability Act; and it is therefore provided that in such cases the employee contracts herself out of the Act, and the doctrine of common employment is to be in full operation. I fail to see how such a clause can have any effect favourable to the claim of the plaintiff, with whose employment the Employers' Liability Act has nothing to do. I think, on the contrary, that the effect of that clause is rather against the plaintiff than in her favour, because it seems to assume that at common law the relation between herself and her employers would be subject to the doctrine of common employment.

FLETCHER MOULTON L.J. I agree. The facts appear to me to bring the case within the ordinary rule as to common employment. The only really novel point is that raised upon clause 8

(1) 16 Q. B. 326.

of the contract. I am satisfied that the object of that clause was to exclude the exceptions from the rule as to common employment introduced by the Employers' Liability Act, 1880, and that it cannot be read as excluding the rule itself.

C. A. 1907

BURR v. THEATRE ROYAL, DRURY LANE, LIMITED.

Application dismissed.

Solicitors for plaintiff: *Charles Russell & Co.*
Solicitors for defendants: *Griffith & Gardiner.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Jan.* 11.

SEWELL *v.* THE NATIONAL TELEPHONE COMPANY, LIMITED.

False Imprisonment—Signing the Charge Sheet—Effect of, Standing alone—Absence of Evidence of causing Imprisonment.

The signing of a charge sheet, standing alone, is not evidence of anything directly causing the imprisonment of the person charged, and will not support an action for false imprisonment against the person who signs.

APPLICATION by the plaintiff for a new trial, or that judgment should be entered for him, in an action tried by Ridley J.

The action was brought to recover damages for false imprisonment and malicious prosecution, but at the hearing the latter claim was abandoned. The false imprisonment alleged in the statement of claim was—that the defendants gave the plaintiff into custody on a false charge of felony, and this was denied in the defence. The plaintiff was the only witness called at the trial, and he stated that he was arrested by police constables and taken to a police station and charged with stealing a piece of metal the property of the defendants, that he was detained in custody till the following morning, when he was brought before a magistrate and committed to quarter sessions, where he was acquitted. It appeared that while the plaintiff was at the police station the defendants were communicated with, and their

C. A. 1907

SEWELL v. NATIONAL TELEPHONE COMPANY, LIMITED.

manager, J. Harvey Lowe, went to the station. What happened then appeared by the following interrogatory and the answer thereto of the secretary of the defendants, which were put in evidence. The interrogatory was: "Did you not, or some person or persons by your authority, on or about the dates mentioned in the statement of claim, prosecute the plaintiff upon the said charge?" The answer was as follows: "In answer to the third interrogatory, I say that Mr. J. Harvey Lowe, on behalf of the defendants, signed the charge sheet on the 21st day of July, 1904, and from that date the defendants were responsible for the prosecution of the plaintiff." There was no evidence of any authority by the defendants or on their behalf to the constables to arrest the plaintiff. The learned judge directed that judgment should be entered for the defendants.

The plaintiff appealed.

Lord Coleridge, K.C., and *Turrell*, for the plaintiff. The case should have been left to the jury, for the signing of the charge sheet was evidence of an authority to the police to detain the plaintiff, and therefore evidence on which the jury could find that the defendants were liable for the subsequent imprisonment. In *Harris* v. *Dignum* (1) a servant was arrested on suspicion of stealing an article the property of an inmate of the house of the defendant, who signed the charge sheet, and that was held to be strong though not conclusive, evidence that he authorized the arrest. That case was subsequent to *Grinham* v. *Willey* (2), in which the defendant, who had signed the charge sheet, was held not to be liable in an action of trespass, but the last-mentioned decision turned on the direct evidence of the police constable that he had taken the plaintiff into custody, and it would appear from the judgments that but for that there would have been evidence for the jury. *Austin* v. *Dowling* (3) is not inconsistent with the view that the case should have gone to the jury, for in that case Willes J. pointed out that signing the charge sheet, with knowledge that the inspector would not otherwise have kept the plaintiff in custody, was the doing an act which might make the

(1) (1859) 29 L. J. (Ex.) 23.
(2) (1859) 4 H. & N. 496; 28 L. J. (Ex.) 242.
(3) (1870) L. R. 5 C. P. 534.

defendant liable without any express direction that the plaintiff was to be detained.

M. Shearman, K.C., and *Stroud*, for the defendants, were not called on.

COLLINS M.R. On the authorities that have been cited to us I am of opinion that the decision of the learned judge was right. The distinction between actions for false imprisonment and actions for malicious prosecution is well settled, and cannot be put better than in the words of Willes J. in his judgment on the case of *Austin* v. *Dowling*. (1) The learned judge said: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them. It may very well happen in the superior Courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case, —which must be within the memory of all of us,—the judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate." Bearing that distinction in mind, this case falls on the side of the line on which no action for false imprisonment will lie. If a person desires to obtain a judicial decision from a proper tribunal, and for that purpose states the facts to a police officer, and the latter, acting on his own initiative, arrests the

(1) L. R. 5 C. P. 534, at p. 540.

C. A. 1907

SEWELL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Collins M.R.

person implicated, no trespass is committed by the person who gives the information to the police officer.

The defendants in this case had nothing to do, so far as appears by the evidence, with the initiation of the charge against the plaintiff. The man had been taken into custody, and not till he was in custody at the police station did the defendants appear on the scene. At that stage their representative signed the charge sheet on their behalf, and the case of the plaintiff is bare of everything but that fact. It is admitted that they took, through their representative, a step which might have been essential to the carrying on of the prosecution, but the action is no longer in respect of a malicious prosecution, for that claim has been abandoned. The act that was done was merely to provide a prosecutor, and that does not let in liability to an action for false imprisonment, unless the person who takes that step has taken on himself the responsibility of directing the imprisonment. It is quite consistent with the signing of a charge sheet that the person who does this is in the position of one invoking judicial intervention. The signing of the charge sheet would not be evidence to go to the jury if contradictory inferences can be drawn from it, for the duty lying on the plaintiff of proving his case would not be completed. The learned judge was bound to withdraw the case from the jury on the ground that there was no evidence in support of it fit for their consideration, and this appeal fails and must be dismissed.

COZENS-HARDY L.J. I agree. There is a passage in the judgment of Pollock C.B. in *Grinham* v. *Willey* (1) which appears to me to be in point: "We ought to take care that people are not put in peril for making complaint when a crime has been committed. If a charge be made mala fide, there are ample means of redress. But in the absence of mala fides we ought not to be too critical in our examination of the facts, to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment." All that appears in this case

(1) 4 H. & N. 496, at p. 498; 28 L. J. (Ex.) 242.

is that the defendants were responsible for signing the charge sheet. That is not evidence of anything directly causing the imprisonment, and the learned judge was right in directing judgment for the defendants.

FLETCHER MOULTON L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *H. S. Bridge.*
Solicitor for defendants: *W. E. L. Gaine.*

A. M.

HORTON *v.* PENN.

1907
Jan. 14.

Licensing Acts—Compensation Charge—Year for which levied—Excise Licence —Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-ss.* 1, 2.

The compensation charge imposed in each year in respect of a renewed licence by quarter sessions under s. 3, sub-s. 1, of the Licensing Act, 1904, is imposed in respect of the period from April 5 of the year in which it is payable until April 5 of the succeeding year.

APPEAL by the plaintiff Horton from a judgment of the county court judge of Middlesex sitting at Bloomsbury.

The action was brought by the plaintiff to recover the sum of 8*l.* 13*s.* 5*d.* which he claimed to be due to him from the defendant under the following circumstances. By an agreement in writing made between the plaintiff and defendant, and dated July 11, 1905, the plaintiff agreed to purchase certain licensed premises from the defendant, the defendant undertaking "to clear up all . . . . outgoings and incumbrances whatever up to the day of taking possession." The purchase was completed on August 9, 1905, when the defendant gave a further undertaking to repay to the plaintiff a proper proportion of all outgoings not taken into account on completion. On October 10, 1905, the plaintiff paid the sum of 15*l.* in respect of a compensation charge imposed upon the premises by quarter sessions on January 20, 1905, and payable on October 10, 1905, under the provisions of

1907

HORTON v. PENN.

the Licensing Act, 1904. (1) The plaintiff claimed the sum of 8*l.* 13*s.* 5*d.* under the agreement and undertaking mentioned above as being the proportion of the 15*l.* referable to the period from January 1, 1905, to August 9, 1905, on the ground that the 15*l.* was paid in respect of the year 1905. The county court judge held that the compensation charge was imposed

(1) By the Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 6, it is provided that all excise duty is to be paid at the time of granting the excise licence; and by s. 16 all excise licences shall expire on October 10 in each year.

Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 13: "And be it further enacted that every licence which shall be granted under the authority of this Act . . . . shall be in force . . . . from the fifth day of April . . . . after the granting thereof, for one whole year thence . . . . next ensuing and no longer . . . ."

Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, sub-s. 1: "Quarter sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act."

Sub-s. 2: "Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose."

Sub-s. 4: "Any sums paid under this Act to quarter sessions in respect of the charges under this section, or received by quarter sessions from any other source for the payment of compensation under this Act, shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund."

Rule 4 of the Rules dated March 10, 1905, made by the Treasury under s. 3, sub-s. 2, of the Licensing Act, 1904: "In the month of November in each year the Commissioners shall, where charges have been imposed in any area or district, make a payment under section 3 (2) of the Act to the proper authority on account of the sums received in respect of those charges of such an amount as in their opinion will approximate to, but will not exceed, the actual amount produced by the charges in that area or district."

Rule 5: "So soon as the actual amount produced by the charges levied in any area or district can be ascertained, the Commissioners shall pay to the proper authority the balance of the amount so produced, provided that the Commissioners may, if they see fit, at any time between the first payment on account and the payment of the final balance make any further payments on account."

(and therefore the 15*l.* paid) in respect of the year from October 10, 1905, to October 10, 1906, and that consequently nothing was due to the plaintiff under the defendant's undertaking. He therefore gave judgment for the defendant. The plaintiff appealed.

1907

HORTON v. PENN.

G. C. Whiteley, for the plaintiff. Sect. 3, sub-s. 2, of the Licensing Act, 1904, merely provides the machinery for collection. As no definition is given of the word "year," it must be taken in its ordinary meaning, viz., the calendar year, from January 1. In *Islington Borough Council* v. *London School Board* (1) the general rate and the poor rate were held to be distinct rates, although the language of s. 10, sub-s. 2, of the London Government Act, 1899 (62 & 63 Vict. c. 14), is more strongly in favour of the rates being considered as one than that of s. 3, sub-s. 2, of the Act of 1904. The decision in that case shews that the compensation charge is not part of the excise duty. Renewals of licences are granted as from April 5 of each year, and if the county court judge was right in his view that the compensation charges are levied for the year from October 10 to the following October 10, a person whose licence is not renewed in April would be taxed up to the following October 10, although his licence ceased to exist before that date, and there is no provision made to refund a proportionate part to him as there is in the case of excise duty under s. 24 of the Excise Licences Act, 1825 (6 Geo. 4, c. 81). In *Malkin* v. *Rex* (2) the point as to when the charge is imposed in each year by the Act of 1904 was expressly left open. Under that Act it was intended that every step should be taken, and if possible completed, within the year. There is a strong presumption in favour of the word "year" meaning calendar year, and very clear words would be necessary to rebut the presumption. The Act of 1904 does not contain words of that character.

[Sect. 3, sub-s. 4, of the Licensing Act, 1904, and rr. 4 and 5 of the Rules dated March 10, 1905, made by the Treasury under s. 3, sub-s. 2, of the Act of 1904, were also referred to.]

Bruce Williamson, for the defendant. The period is not

(1) [1903] 2 K. B. 354. (2) [1906] 2 K. B. 886.

1907

HORTON v. PENN.

January 1 to January 1. That is clear from the judgment in *Malkin* v. *Rex* (1), where Walton J. held that the holder of the provisional licence was not liable to pay any contribution to the compensation fund, although he had traded from January 1, 1905, to April 5, 1905, under a licence which was liable to the contribution if the Act of 1904 imposed it as from January 1, 1905. *Islington Borough Council* v. *London School Board* (2) is distinguishable, for s. 3, sub-s. 2, of the Act of 1904 makes the contribution to the compensation fund payable "as part of" the excise duty. Those words are not contained in s. 10, sub-s. 2, of the London Government Act, 1899 (62 & 63 Vict. c. 14), which was under consideration in that case. The effect of the contribution to the compensation fund being made part of the excise duty is that the contribution to the compensation fund is brought within s. 24 of the Excise Licences Act, 1825 (6 Geo. 4, c. 81), and a proportionate part is therefore recoverable for any period of time during which the house has not been licensed.

[The Excise Licences Act, 1825, ss. 6, 16, and rr. 10, 55, 57, 61 of the Rules made by the Secretary of State for the Home Department, dated December 20, 1904, under s. 6 of the Licensing Act, 1904, were also referred to.]

DARLING J. This is a difficult case, because the language used in the Licensing Act, 1904, might be read to mean either of three things. Sect. 2, sub-s. 1, of the Act provides that "Where quarter sessions refuse the renewal of an existing on licence under this Act, a sum . . . . shall be paid as compensation to the persons interested in the licensed premises." The money to carry out that is to be raised in manner prescribed by s. 3, sub-s. 1, which enacts that "Quarter sessions shall, in each year" (it does not say when the year is to begin, and the language is capable of the construction that the year begins on January 1 or on April 5, the date from which the renewal of licences takes effect, or October 10, when the compensation charge and excise duty become payable) ". . . . for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges . . . ." It is

(1) [1906] 2 K. B. 886. (2) [1903] 2 K. B. 354.

therefore the duty of quarter sessions to impose those charges in order that a sufficient fund may be raised to compensate, under s. 2, sub-s. 1, of the Act, persons whose licences they refuse to renew. It appears that about the last week of February or the first week of March in each year they decide what licences shall be refused and what renewed. When the licence is renewed the renewal takes effect as from April 5. Until that date there is no renewed licence in existence. It would be impossible to say that any money would be required for compensation till then, and therefore I cannot think that "each year" means the year of our Lord, i.e., from January 1 to January 1, which was the contention of Mr. Whiteley on behalf of the plaintiff. The county court judge adopted the view that the year referred to was from October 10 in one year to October 10 in the following year, by reason of the language of s. 3, sub-s. 2, of the Act, viz., "Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence . . . ." Excise licences are granted each year from October 10 to October 10, and if the meaning of s. 3, sub-s. 2, of the Act of 1904 is that the charges levied for compensation purposes are paid in respect of the same period, the county court judge was right in deciding that nothing was due from the defendant to the plaintiff, because the charge was paid in respect of a period which commenced after possession of the public-house had been given up. Sect. 3, sub-s. 2, of the Act of 1904 continues, "but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose." Therefore, although money is paid in respect of the excise licence and the compensation at the same time, the two payments are not placed to the same, but to different accounts according to rules made by the Treasury. The Treasury made Rules dated March 10, 1905, and by rr. 4 and 5 the money for the compensation fund eventually gets into the hands of the compensation authority. It has been pointed out in argument that if a person has taken

1907

HORTON v. PENN.

Darling J.

out on October 10 an excise licence entitling him to sell intoxicating liquors, and he ceases to trade before the expiration of the year for which the excise licence is granted, provision is made by s. 24 of the Excise Licences Act, 1825, for refunding a proportionate amount of the excise duty, whereas there is no corresponding provision for the return of a proportionate part of the charge paid in respect of the compensation fund. That appears to me to shew that the charge in respect of the compensation fund is not to be considered as part of the excise duty. In my opinion s. 3, sub-s. 2, of the Act of 1904 is a mere provision for collection, and the fact that the compensation charges are payable on October 10 does not assist the Court in arriving at any conclusion as to when the year in respect of which the compensation charges are paid commences. Whichever of the three periods suggested is adopted, some inconvenience must result. I have come to the conclusion that the year reckoned from October 10 to October 10 is not the year contemplated by the Legislature. Nor do I think the year intended is from January 1 to January 1, inasmuch as the licence might not be renewed in April. In my opinion the period is the year during which the licence is in operation as a licence, viz., from April 5 to April 5; and, when that period expires, whether the charge is or is not imposed again depends upon whether the licence is or is not renewed. The balance of convenience is in favour of that period—from April 5 to April 5; and there is nothing in the Act of 1904 which precludes us from holding that to be the term. I am therefore of opinion that in respect of that period the compensation is paid.

PHILLIMORE J. I am of the same opinion. The period from January 1 to January 1 has nothing to recommend it except that it is the calendar year. It is open to the two objections which can respectively be advanced against the "April to April" year and the "October to October" year.

With respect to the "April to April" period, I should like to adopt the words of Darling J. I think the charge imposed by quarter sessions is in respect of the period April 5 to April 5.

As against that it is possible to contend that the year runs

from October 10, because the compensation charge is collected on that date; but I do not think any inference can be drawn from that fact. Taxes are collected indifferently on the precise date that they are due or in advance of or subsequently to the immediate date, and, although the excise duty is not collected in arrear, there is no difficulty in holding that the compensation fund is collected six months in arrear. There is an objection to the "April to April" year in that a person may escape payment of the charges by giving up his licensed premises and not taking out an excise licence on October 10. There is an objection to the "October to October" year, because if his licence is not renewed in the following April there is no provision to refund him a proportionate part of the charges paid in respect of the period from April 5 to October 10. The latter objection is far more serious. As regards the former, a person does not in fact give up his licence, which is a very valuable asset, and the Act of 1904 was passed in contemplation of the fact that licences are not voluntarily abandoned. In my opinion the compensation is paid in respect of the period from April 5 to April 5.

Appeal allowed.

Solicitor for plaintiff: *R. J. Twyford.*
Solicitors for defendant: *Martineau & Reid.*

J. E. A.

C. A.
1907
Jan. 21, 23.

[IN THE COURT OF APPEAL.]

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY *v.* THORNTON URBAN DISTRICT COUNCIL.

Local Government Acts—General District Rate—Assessment—Tramroad—Tramway—Land "used only as a Railway constructed under any Act of Parliament"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Under the powers of local Acts of 1896 and 1898 a company constructed and maintained a tramroad connecting two systems of tramways; various provisions of the Railways Clauses Consolidation Act, 1845, were incorporated in the local Act of 1896 and applied to the tramroad, which for the purposes thereof was to "be deemed to be a railway"; certain provisions of the Tramways Act, 1870, were made applicable only to the tramways, and certain provisions of the Railway and Canal Traffic Acts, 1854, 1873, and 1888, were applied to the company "as if it were a railway company" and to the tramroad and tramway "as if they were railways." The tramroad, which was on raised rails, laid on sleepers, was constructed on land the exclusive property of the company, fenced off from adjoining land except at the level crossings of roads; the tramroad and tramways were worked as one undertaking by electricity on the overhead system:—

Held (Buckley L.J. doubting), reversing the decision of the Divisional Court, that the tramroad was land "used only as a railway constructed under the power of an Act of Parliament for public conveyance" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the company were consequently entitled to be assessed in respect of the said railway at one-fourth of its net annual value.

Origin of words "tramroad" and "tramway" discussed.

This was an appeal from the decision of a Divisional Court on a case stated by the court of quarter sessions for the county of Lancaster upon an appeal against a rate; the point for decision being whether a "tramroad" constructed upon lands the exclusive property of the plaintiff company and connecting two tramway systems was, for rating purposes, to be treated as a 'tramway" or as a "railway" so as to be entitled to the benefit of the deduction in the rate allowed by the Public Health Act, 1875, s. 211, sub-s. 1 (*b*), for "land . . . . used only as a canal . . . . or as a railway constructed under the powers of any Act of Parliament for public conveyance."

The facts stated by the case, so far as material, were as follows:—On July 16, 1904, the Thornton Urban District Council (thereinafter called "the council") made a general district rate upon all property in their district for the purpose of defraying the expenses incurred by them in the execution or by virtue of the Public Health Acts, and the Blackpool and Fleetwood Tramroad Company (thereinafter called the "tramroad company") were thereby rated (inter alia) as owners and occupiers of certain premises in the said rate, viz., "Tramway Track Cleveleys, rateable value, 708*l.*"; this being the full net annual value. The tramroad company were incorporated under the Blackpool and Fleetwood Tramroad Act, 1896 (thereinafter called the Act of 1896), for the purpose of making, maintaining, and working the tramroad and tramway (thereinafter respectively called "the tramroad and tramway") described in, authorized by, and subject to the provisions of the Act aforesaid and of the Blackpool and Fleetwood Tramroad, Act, 1898. The tramroad was constructed on lands the exclusive property of the company except where it passed over certain roads and public highways by means of level crossings which the company were authorized to make, and such lands were acquired by them under the provisions of the Act of 1896, and were fenced off from the adjoining lands. Passengers by the tramway in Fleetwood and the tramway hereinafter mentioned in Blackpool entered the cars from the street, and there were stopping places along the route of the tramroad. Where the latter crossed the public roads named in s. 47 of the Act of 1896 there were no gates across the roads nor across the tramroad, but the company had been permitted by the Board of Trade to construct and maintain cattle-guards at such crossings and to employ flagmen to control the traffic at all of them but two. The tramroad and tramway, in accordance with the provisions of the Act of 1896, made a junction with a certain other tramway constructed along the surface of certain streets and roads. The tramroad and tramways aforesaid were worked by the company as one continuous route, and passengers were booked and conveyed from one end to the other without break. The land forming the premises referred to in the rate was used for no other purpose than for the tramroad, which was wholly

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

situate on such land, save and except where it crossed a public road as aforesaid. The company paid passenger duty in respect of passengers carried upon the tramroad under the Act 5 & 6 Vict. c. 79, but their liability to pay such duty under that Act or otherwise and the circumstances and extent of their payment were not explained. For the respondents it was contended that the land in question was not land used as a railway constructed under the powers of any Act of Parliament within the meaning of s. 211, sub-s. 1, of the Public Health Act, 1875. The appellants contended that the tramroad was and could only be worked as a railway, and that it was entirely separate from the tramways, and was, in fact and in law, used as a railway, and, therefore, the said premises were lands used only as a railway, and the company as owners thereof should not be assessed in respect of the same to a greater extent than in the proportion of one-fourth part only of the net annual value thereof. It was agreed that the court of quarter sessions were bound by the authority of the case of *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1) to read the material words of s. 211 of the Public Health Act, 1875, as follows, viz., "Or used only as a railway," &c. The court of quarter sessions were of opinion that the lands were not so used, and, therefore, were not used as a railway within the meaning of the said section, and they dismissed the appeal. The question for the opinion of the Court was thus stated by paragraph 18: "Whether the said 'Tramway Track Cleveleys' are lands used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211, sub-s. 1, of the Public Health Act, 1875, and whether the company as owners thereof ought to be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof under the provisions of the said section."

The material provisions of the Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 Vict. c. cxlvii.), upon the construction of which the case largely depended, were as follows:—

By s. 2 the following Acts were incorporated to the extent therein mentioned: The Companies Clauses Consolidation Act,

(1) [1892] 1 Q. B. 357.

1845. Parts I. and III. of the Companies Clauses Act, 1863, as amended by the Companies Clauses Act, 1869. The Lands Clauses Acts: "The provisions of the Railways Clauses Consolidation Act, 1845, with respect to the temporary occupation of lands near the railway during the construction thereof, and with respect to mines lying under or near to the railway, and with respect to the carrying of passengers and goods upon the railway and the tolls to be taken thereon. . . . . Provided that the provisions of the Railways Clauses Consolidation Act, 1845, herewith incorporated shall apply only to the tramroad by this Act authorized and for the purposes thereof the tramroad shall be deemed to be a railway and the company shall be deemed to be a railway company." Certain provisions of the Tramways Act, 1870, were also incorporated, and were to apply only to the tramway authorized by the Act. Power was given by s. 6 to make the tramroad and tramway as described in the Act, which by s. 36 were not to be opened for public traffic until they had been inspected and certified by the Board of Trade.

By s. 35 the tramroad and tramway were to be constructed on a gauge of 4 ft. 8½ in.

By ss. 47, 48, 49 and 50 the provisions of the Railways Clauses Acts as to level crossings, powers to deviate and cross roads, were made applicable "as if the tramroad were a railway within the meaning of that Act," or "as if the same were a railway" or in "the same manner as if it were a railway."

Provision was made as to the carriages to be used on the tramroad and tramway, and the use of electrical or mechanical power, and to charge rates for merchandise, fares, &c.; and by s. 82 the provisions of the Railway and Canal Traffic Acts, 1854, 1873, and 1888, were applied to the company "as if they were a railway company," and to the tramroad and tramway "as if they were railways." Sect. 85 provided that nothing in the Act should be deemed or construed to exempt the company or the tramroad and tramway from the provisions of any general Act relating to tramways and tramroads then in force or which might thereafter pass, or from any future revision or alteration of the maximum tolls or charges authorized by the Act.

The Blackpool and Fleetwood Tramroad Act, 1898 (61 & 62

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON-URBAN COUNCIL.

Vict. c. cl.), by s. 3 made provision for the contingency of the undertaking being sold to the local authority under s. 43 of the Tramways Act, 1870.

The tramroad was laid on raised rails upon sleepers ballasted like an ordinary railway. The whole was worked by electricity on the overhead system.

The Divisional Court (Lord Alverstone C.J. and Lawrance and Ridley JJ.) came to the conclusion that this tramroad was not intended by the Act of 1896 to be a "railway" for all purposes, and affirmed the decision arrived at by the justices and dismissed the appeal. The plaintiff company appealed.

The appeal was heard on January 21.

C. C. Hutchinson (*Danckwerts, K.C.*, with him), for the appellants. The land occupied by this tramroad is "used only as a railway constructed under an Act of Parliament for public conveyance"; in fact, and in law, it is a "railway." The "tramroad" is constructed upon lands acquired compulsorily, the exclusive property of the company: the rails are raised rails and laid on sleepers just as a railway is laid; this is one main distinction between it and a "tramway" which runs along public streets and in grooved rails. As a fact, the Board of Trade have required payment of passenger duty, as is done in the case of a railway. In at least four essentials there is no difference between this tramroad and a railway: (1.) It runs on private lands the exclusive property of the company. (2.) There are stations from and to which traffic is conducted. (3.) Level crossings regulated by the Board of Trade just like a railway. (4.) Mode of construction.

In some of the older cases and older Acts of Parliament the words used are "railway or tramroad." This is so in the Liverpool and Manchester Railway Acts, 1829, the Stockton and Darlington Act of 1821, and Newport Docks Act, 1835. "Tram" is derived from Sir James Outram's name, who in 1740 or thereabouts made wooden "tramroads," and these "tramroads" were known before the birth of railways. By the standing orders of Parliament the term "railway" includes a "tramroad." If the local Act of 1896 is looked at it is plain

that two complete schemes were contemplated and provided for, the "tramway" and the "tramroad"; but as regards the latter, both as to construction and user, it is treated by the Act as a railway. The reason why railways were allowed a reduction in rates was because they do not enjoy the full benefit of the rate, as stated in *South Wales Ry. Co.* v. *Swansea Local Board of Health*. (1) Except as to the power of making by-laws, s. 2 of the local Act of 1896 gives the company every power necessary for the use of this land as a railway for purposes of public conveyance. The principles laid down by *South Wales Ry. Co.* v. *Swansea Local Board of Health* (1) and *Newport Dock Co.* v. *Newport Local Board* (2) apply here. This tramroad is quite different and distinct from the tramway, and when the Public Health Act of 1875 speaks of "railways" it cannot possibly be supposed to have meant tramways: *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority*. (3) Whatever is necessary for the physical use of the railway is to be treated as railway, for land "used only as a railway" means physical use as a railway: *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners*. (4) The company use this tramroad as a railway. It is user that determines the right to exemption: *Williams* v. *London and North Western Ry. Co.* (5); *Yorkshire (Woollen District) Electric Trams, Ld.* v. *Ellis* (6); *Wakefield Light Railways Co.* v. *Wakefield Corporation* (7), where a light railway running along the streets was held to be "used as a railway" within s. 211, sub-s. 1 (*b*), of the Public Health Act.

This "tramroad," therefore, is in fact and physically a "railway constructed under an Act of Parliament for public conveyance"; it is used as a railway, and for these reasons the decision of the Divisional Court is wrong.

E. Sutton and *J. Hodgson*, for the respondents. By s. 2 of the local Act of 1896 the provisions of the Railways Clauses Consolidation Act, 1845, thereby incorporated are applied to the

(1) (1854) 4 E. & B. 189, at pp. 196, 197.
(2) (1862) 2 B. & S. 708.
(3) [1892] 1 Q. B. 357, at p. 360.
(4) [1897] 1 Q. B. 287.
(5) [1900] 1 Q. B. 761
(6) (1905) 92 L. T. 202.
(7) [1906] 2 K. B 140.

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

tramroad, which, for this purpose, is to be "deemed to be a railway," and the company is to be "deemed to be a railway company"; and by ss. 47, 48, 49, and 50 its provisions are again made applicable to the tramroad "as if the same were a railway," shewing that, in the words of the 1896 Act, the tramroad is not a railway, though for certain purposes, but not for all purposes, it is to be treated as if it were a railway. The Conveyance of Mails Act, 1893, speaks of railways, tramroads and tramways, and enacts that "tramroads" authorized by any Act passed after 1893 shall for the purpose of conveyance of mails be deemed to be railways; the Legislature, therefore, in 1893 contemplated the existence of tramroads which were not railways. If this tramroad were a railway, the Railway Regulation (Gauge) Act, 1846, which prescribes a gauge of 4 ft. 8½ in. for all railways, would apply, but the local Act, 1896, s. 35, thinks it necessary to fix the gauge at 4 ft. 8½ in. All the special provisions as to level crossings, contained in the local Act would be unnecessary if this were a railway. The inference, therefore, from the local Act is that this is not a railway for all purposes. "Tramroad" and "tramway" are practically the same thing: the tramroad is on raised rails over private land, and the tramway is on grooved rails along the streets, but it is all one undertaking, and it is not true to say that part is a railway and part a tramway. The Act of 1898, s. 3, makes provision for the purchase of the undertaking by the local authority under s. 43 of the Tramways Act, 1870, and this power could not have been given if part of it were a railway.

In order to obtain the benefit of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, this road must be used "as a railway constructed as a railway" under Act of Parliament; mere user as a railway is not enough. The word "railway" is used only in two sections of the Public Health Act, 1875, ss. 147 and 211, sub-s. 1 (*b*). Sect. 147 is a re-enactment of s. 40 of the Local Government Act, 1858, which speaks of "railway or tramroad"; s. 147 speaks of "railway or tramway." Sect. 55 of the Local Government Act, 1858—which is very much the same as s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875—only gives the

benefit of the reduction to "railways," which shews a distinction between railway and tramroad for rating purposes; so that the inference is that "railway" in s. 211, sub-s. 1 (*b*), cannot mean "railway or tramroad." This tramroad was not constructed as a railway for all purposes, otherwise the Railway Regulation Acts, 1840 to 1889, would apply.

[Several sections from the Railway Regulation Acts, 1840 to 1889, and from the Railway Regulation Act, 1893, were referred to or mentioned to shew that the provisions of these Acts could not consistently be applied to this tramroad.]

If this road was intended to be a railway, some limitation on the application of these Acts would have been inserted in the local Act, as is done in the Light Railways Act, 1896. The decision of this point cannot depend upon whether part runs upon raised rails through private land and part runs on grooved rails through public streets, the Act and the structure must be looked at as a whole, and as one undertaking. Though part may resemble a railway, it is really a tramway, and as a tramway it should be rated.

Hutchinson, in reply. The Court can decide this case as a question of fact; this road differs in no respect from a railway. In the earlier Acts railways and tramroads were referred to as the same thing. It cannot be truly said that tramways did not exist before 1870: there was one at Birkenhead in 1860. The way of applying the various public Acts to a private Act is by saying the thing authorized to be constructed shall be "deemed to be a railway."

Cur. adv. vult.

Jan. 23. THE PRESIDENT (SIR GORELL BARNES). This case has been very ably argued, and there is no doubt that it gives rise to points of very considerable difficulty. The difficulty I have found is not so much in stating the facts which came in question, nor in stating the question that has to be determined, but in finding the proper answer to that question as stated in paragraph 18 of the case.

[After reading paragraph 18, and stating the facts and contentions of the parties from the case, the President continued:—] It

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

The President.

is practically impossible to find any physical difference between this tramroad and what is popularly understood as a railway of the ordinary character, and no difference in that respect was suggested by counsel for the respondents, but they contended that it was not a railway for all purposes. Physically it seems to me that it is a railway; it is a road containing rails on which vehicles must travel in the ordinary way in which railway traffic is conducted.

The meaning of the words "tramroad" and "tramway" was a good deal considered in the course of this case, and counsel for the appellants, who seemed to possess a very wide and extensive knowledge on this subject, suggested that the origin of "tram track" or the word "tramroad" was derived from the termination of Sir James Outram's name, who had adopted a system of traction along timber, or something of that character, as far back as 1740. I have had in my early days some little acquaintance with the mineral districts, and I do not quite agree in that being the origin of the term. But I only refer to this because it is material in seeing how these trams have developed and where they originated, and because it does throw some light on the question which we have to consider. As far as I am able to gather from my own researches, I think the result may be stated thus. It is really a process of evolution. As far back as, I think, even 200 years ago, long before Sir James Outram was heard of, difficulties were felt in providing adequate surfaces for heavy traffic; the ruts which were formed in bad weather were a very serious matter, and the first idea seems to have been to lay planks or baulks of timber in the ruts. Then it was improved by putting something over them in the shape of plankings to make it still smoother. The wheels used to pass over this class of structure, and, being wide roller wheels, they could easily be kept upon what was the track or way, and these tracks were called ways or wayleaves, because they generally passed from one person's property to some place on property other than that which belonged to the person from whose property the materials were carried. Then the next step seems to have been to lay iron plates on the top, which made the surface still smoother, and then came what, I think, was the origin of the term "tram."

Somebody hit upon the idea of preventing the wheels or rollers from getting off the track by putting a light rail on the top of the track, and that was called a trammel rail, and hence came the word, so far as I can make out, of tramrail or tramroad. The next idea was, instead of letting the wheel rest on the road, to make the little rail a good solid rail, so that the wheel rested on the rail and not on the road, and there you get the railroad. Then it almost follows, as a matter of course, that the "railroad" and "tramroad" became synonymous terms. So that you have a "railway" and a "railroad" or a "tramroad" practically all meaning the same thing. I think that is probably the way in which this nomenclature has arisen, though I am only stating that in much the same way as counsel made the suggestion as to how the terms arose. We certainly find in one of the earlier Acts which counsel referred to, the Liverpool and Manchester Railway Acts of 1829, the words "a railway or tramroad," and in an earlier one still, namely, the Stockton and Darlington Act of 1821 the term was "railway or tramroad," and it is used in one which I have before me, the Newport Docks Act of 1835 or 1836, the Act which created the powers described in the report of *Newport Dock Co.* v. *Newport Local Board* (1), and gave authority to make and maintain a "railway or tramroad"; and in that case, which was raised under the Local Government Act, 1858, it was held that the railways or tramroads constructed for public conveyance under the local Act were rather the exception in s. 35 of that Act, which is something similar, if not quite the same, as s. 211, sub-s. (*b*), of the Act of 1875, with which we are concerned and were to be rated at one quarter only of the net annual value. Now that that has some foundation I think is also to be noticed from the way in which a railway was originally spoken of in early days: for instance, in such an Act as the Railways Conveyance of Mails Act, 1838 (1 & 2 Vict. c. 98), which speaks of railways made or in progress by which passengers or goods shall be conveyed in or upon "carriages drawn or impelled by the power of steam or by any locomotive or stationary engines or animal or other power." At that time, in 1838, matters had hardly developed, so that there would be an

(1) 2 B. & S. 708.

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

The President.

exclusive use of power of a mechanical character. Tramways, as we now popularly understand them, appear to have been, in England at any rate, of a later order. They, speaking generally, are understood to be a street railway not interfering with the ordinary traffic, with the rails in grooves and the propulsion being either by animal or mechanical power. As far as I can ascertain, they were first used somewhere about 1830 or 1832 in America, and the first trace of them in England—and I believe counsel so stated, and I think it is correct—was at Birkenhead in 1860, where they were laid through the streets, and gave rise to difficulties and questions of nuisance that ultimately resulted in the Tramways Act of 1870, which is referred to in the Acts under which the present company is incorporated.

So far I have pointed out what appear to me to be the physical considerations affecting this question. There is the further question what is the position of this tramroad speaking from the legal point of view, and for this we have to look at the Acts under which it is constituted. [Having stated in detail the material sections of the Blackpool and Fleetwood Tramroad Acts, 1896 and 1898, observing in passing that two complete schemes were contemplated, a scheme for the tramroad and a scheme for the tramway, but that as regards the tramroad, both in construction and in user, it was in effect treated in the Act of 1896 as a railway, the President continued:—] It is said that under the Public Health Act, 1875, this road was not constructed as a railway, and, therefore, that s. 211, sub-s. 1 (*b*), does not give the benefit which is claimed; therefore one has to see what is the meaning of s. 211. But before dealing with that section, I may mention that the term "railway" is only used in two sections of the Public Health Act, 1875. The first occasion on which the word is used is in s. 147, which gives power to an urban authority to construct or adopt public bridges, &c., over canals, "railways or tramways." That section takes the place of s. 40 of the Local Government Act, 1858 (21 & 22 Vict. c. 28), where power was given to local boards by consent to erect public bridges over canals, "railways or tramroads." There you have the old words "railways or tramroads" used, which are now in the Act of 1875 used as "railway or tramway." I am not

sure whether the explanation is to be derived from what I have referred to more or less historically, that in 1858 the tramway, as we understand it, was not really a matter that was in use, and there was only what were called railways or tramroads; but when we get to 1875, which is after tramways had been dealt with by the Tramways Act of 1870, we find railways described, and tramways described, and there is nothing very inconsistent with the view that "railway" there might mean railway or tramroad. The other place in which the word "railway" is used is the section in question—s. 211. That section provides that "with respect to the assessment and levying of general district rates under this Act the following provisions shall have effect, namely." Sub-s. 1 (*b*), the important part, is, "and the occupier of any land covered with water, or used only as a canal or towing path for the same or as a railway"—I think the word "only" covers both, as has been decided—"or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." In construing that section as applicable to the present case, one has to consider what was the object of granting that exception. It seems to me, when one considers the subject-matters which are mentioned in that sub-section, that there was a difference between the lands mentioned in this sub-section and other kinds of property, so far as regards the benefits which may be derived from the district rate. The former probably do not get the benefit or the full benefit of sewerage, or of lighting, or of other matters, and a railway cannot be used for any other purpose than a railway. That this is so I think is made clear by the observations which were made by the learned judges in the case of *South Wales Ry. Co.* v. *Swansea Local Board of Health* (1), where the question which arose was under the Public Health Act, 1848, s. 88, and was with regard to what was a railway and what the word included. I do not desire to refer to that part of the judgment which deals with that point, but in the course of his judgment Lord Campbell, in considering the exemption in that Act which corresponded with the exemption given by the

(1) 4 E. & B. 189.

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

The President.

said sub-section of the Act of 1875, said (1): "And this is just; for though the railway companies do not derive benefit from all the purposes for which the district rate is levied, yet the stations and other property occupied derive benefit in perhaps a greater degree than any other species of property from the chief expenditure of the rate, and it would be unjust if these premises were not rated equally with other property." That is, they are distinguishing between the stations and the railway itself. Again, Erle J., as I think he then was, said as follows (2): "The general scheme of the enactment is that the occupiers of the classes of property most benefited by the expenditure of the district rates shall be liable to be rated at a higher rate, the occupiers of the classes less benefited at the lower rate, and the class of property most benefited is that which is occupied immediately for the purpose of residence, and the kinds of property not so occupied are not to be rated so highly. Such is the general object of the Act, and we are now to apply its language to the particular case." Undoubtedly that reasoning applies to the present case, because, as I have said, it is impossible to distinguish the piece of tramroad from a railway, and the reason for the exemption in the said section applies just as much to this piece of tramroad as it would to any ordinary railroad passing through parts where it was not deriving the full benefit from the district rates in those parts. It is said—and this is the principal argument for the respondents—notwithstanding all that, this tramroad is by the express words of numerous sections of the Act of 1896 only to be deemed to be a railway for certain purposes, and that it is not one to which the word "railway" in this particular sub-section applies. The reading which I adopt of this sub-section is that it applies to land used only as a railway, constructed as a railway in fact under the powers of any Act of Parliament for public conveyance. For the purposes of the Act of 1875, and that sub-section, it appears to me that this is a railway in fact constructed under the power of an Act of Parliament for public conveyance.

The argument of counsel for the respondents appears to require the insertion after the word "constructed" of the words "as a railway." I have a difficulty in appreciating exactly what is

(1) 4 E. & B. 189, at p. 196. (2) Ibid. at p. 197.

meant by putting in the words constructed "as a railway." If it means constructed as a railway in fact, it seems to me that their own statement in argument shews that this case comes within that definition. If it is meant to say that it must be constructed as a railway to which all the railway legislation applies, I do not find those words there, and it does not seem to me that it is necessary to put such a construction upon the Act. It does not seem to me necessary to say that every Act applicable to a railway in the ordinary sense, is bound to be applied, and that unless it is applied it is not to be treated as a railway. In connection with this branch of the argument counsel felt great difficulty, although a great many Acts were referred to, in pointing out any Act which was inconsistent with this view, or any Act which might not consistently be applied to this particular tramroad, when that Act related to railway matters. I am not going to embark on the very wide investigation of how far it may be said that all Railway Acts do or do not apply to this particular tramroad. This is a very wide inquiry, and it seems to me it does not necessarily shew that the construction which the respondents seek to place upon the sub-section is the correct one.

The other principal argument which was put forward on behalf of the respondents was that the undertaking referred to in the two Acts in this case must mean the whole undertaking, and that it cannot be divided, and that as part is a tramway and part is a railroad the Court cannot treat them separately, and cannot consider part of it as being a railway within the meaning of the sub-section to which I have referred. I confess I do not follow that argument. It does not seem to me to be sound, and it does not seem to me to accord with the difference which is made throughout these Acts of 1896 and 1898 in the provisions which apply to the two different sections respectively of the line in question.

I do not propose to go over the whole of the cases which have been cited in this case. The last one that was referred to was the case of *Wakefield and District Light Railways Co.* v. *Wakefield Corporation.* (1) That decision, so far as it goes,

(1) [1906] 2 K. B. 140.

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

The President.

is more in favour of the appellants, certainly, than it can be said to be against them, but I do not desire to express any opinion upon that case.

The result is that it appears to me the judgment of the Court below was wrong, and that the appellants succeed in this case because they have shewn that, bearing in mind that we are simply construing s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, we are dealing with land "used only as a railway, constructed under the powers of an Act of Parliament for public conveyance" within the meaning of that section.

Therefore, in my judgment, this appeal ought to be allowed.

FARWELL L.J. The appellants claim to be entitled to the benefit of the proviso in s. 211 of the Public Health Act, 1875, on the ground that the land, in respect of which they are rated, is land used as a railway constructed under the powers of an Act of Parliament for public conveyance. It is conceded that physically the land in question, with the rails and other appliances on it, is undistinguishable by the eye from an ordinary railway: the rails are not sunk in the ground as tramway lines are, but are laid on sleepers and are above the surface, and are fixed in the way usual in railways; the land on which they are laid has been acquired by, and is the property of, the appellants, and is fenced off from the adjacent premises, and no one has any right to come thereon without the permission of the appellants. Further, it was constructed under a private Act, the Blackpool and Fleetwood Tramroad Act, 1896, for public conveyance. I will not read the numerous sections—they have been referred to by the President; it is sufficient to say that in my opinion, on the true construction of that Act, the tramroad is not expressed to be constructed so as to be a railway in name for all purposes under that Act, but that it is expressed to be constructed so as to be a railway in name for the purposes of those clauses of the Railways Clauses Consolidation Act, 1845, that are incorporated therein (including those relating to public conveyance). Further, for anything that I can see to the contrary, it may well be a railway within the definition of several public and general Acts relating to railways; and there are no

words negativing the possibility of its being a railway within the meaning of other Acts; but in my opinion it is immaterial whether this is so or not. Sect. 211 deals with local rates, and the deduction allowed from such rates is not contingent on, nor indeed has it any connection with, the fulfilment of public duties or the performance of Imperial services, but rests on the just principle that the occupier who cannot, from the nature of his holding—whether it be tithe, orchard, canal or railway—get as much benefit as the occupiers of other property from the expenditure of the local rates ought not to contribute as much as they do to such local rates.

It is contended that inasmuch as the Act of 1896 does not authorize the construction of the tramroad as a railway in specific terms for all purposes, it is not within s. 211. In my opinion this is too narrow a view. I do not think that the case ought to be decided on a minute examination of the meaning of the various sections in the Acts of 1896 and 1898; the word "railway" has no exact technical meaning, and the definitions in various Acts of Parliament vary according to the varying purposes for which those Acts were passed. We have to consider the object and scope of the general Act, and we find this laid down in *South Wales Ry. Co.* v. *Swansea Local Board of Health* (1), the material portions of which have been cited by the President, a case under the Act of 1848, and in *Newport Dock Co.* v. *Newport Local Board* (2), a case under the Act of 1858, in both of which Acts the words are the same as in that of 1875. It is obvious that the reasons given in those cases apply in exactly the same way to this tramroad as to any railway, and in my opinion the proper way of considering the section is first to ascertain whether in fact the property in question is or is not a railway, as that phrase is ordinarily understood according to the ordinary rule of construing statutes that they shall be construed uti loquitur vulgus, that is, according to the common understanding and acceptation of the terms—per Dr. Lushington, *The Fusilier* (3) —and then to ascertain whether it has been constructed under the powers of an Act for the purpose of being used as a way or road

(1) 4 E. & B. 189. (2) 2 B. & S. 708.
(3) (1864) 34 L. J. (Pr. M. & A.) 25, at p. 27.

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

Farwell L.J.

for public conveyance. If these two questions are answered in the affirmative it cannot make any difference whether the road or way is called in the Act a railway or a railroad or a tramroad. I say nothing about the word "tramway," because, since 1870, it may be said to have a technical meaning and to be distinguished from a railway or railroad, as it indeed is in s. 147 of the Public Health Act, 1875, and I wish to express no opinion as to the decision in the case of *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority.* (1) But I can see no reason why the equitable deductions allowed by s. 211 should depend on whether the company claiming it is called in its private Act "railway or railroad or tramroad or road," nor on the incorporation of all, or some only, of the clauses of the Railways Clauses Consolidation Act, 1845. This road was in fact constructed under an Act which incorporates the provisions of the Railways Clauses Consolidation Act, 1845, relating to public conveyance; whether it has been so constructed as to be a railway or not is a question, not of words, but of fact; it is conceded that it is so constructed as to differ in no way from a railway, and that it is used under the Act for public conveyance, and it is therefore constructed under the Act as a railway for public conveyance by whatever name it may be called. I am, therefore, constrained to differ from the Divisional Court. The question should, therefore, be answered that the "Tramway Track Cleveleys," are lands used only as a railway constructed under the powers of an Act of Parliament for public conveyance under s. 211 of the Public Health Act of 1875, and the company ought to be assessed in respect of the sum in question divided as contended for.

THE PRESIDENT. I agree as to the answer to the question.

BUCKLEY L.J. The question for decision is whether the land assessed is land "used only as a railway constructed under the powers of an Act of Parliament for public conveyance" within those words in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. The land in question is land upon which has been constructed

(1) [1892] 1 Q. B. 357.

some part of the "tramroad" mentioned in the Blackpool and Fleetwood Tramroad Acts, 1896 and 1898, the "tramroad" being that part of the way authorized by the Act of 1896, which was to be laid, not in the public streets, but upon land to be acquired by the tramroad company. The "tramroad" in question is a subject-matter which was constructed under the authority of the special Act of 1896. Its existence originated under that Act, and its true character can only be ascertained by determining from a perusal of that Act, and of the subsequent Act of 1898, what is the subject-matter whose creation was authorized. Upon a review of those Acts I arrive at the conclusion that the tramroad there authorized is a subject-matter which is not a railway, meaning by that expression a railway such as is governed by the system of legislation beginning with the Railways Clauses Act of 1845; that it is not what the Blackpool Act of 1896 calls a "railway within the meaning of" the Railways Clauses Act, 1845, or of the Railways Clauses Act, 1863. I content myself with indicating quite shortly how I arrive at this conclusion. First, there are many sections of the Act of 1896 in which the provisions of the Railways Clauses Act, 1845, and subsequent Railway Acts are made applicable to the tramroad "as if it were a railway," and provisions that in applying certain parts of those Acts the tramroad shall "be deemed to be a railway within the meaning of" the Railways Clauses Act, 1845, or of the Railways Clauses Act, 1863, expressions which necessarily involve that in the language of the Act of 1896 the tramroad is not a railway within the Acts of 1845 and 1863, but is for certain purposes, but not for all purposes, to be treated as if it were that which the Act by implication says it is not. This will be found true of ss. 2, 47, sub-s. 4, 48, 49, 50 and 82 of the Act of 1896. Sects. 47, sub-s. 4, 49 and 50 speak of a "railway within the meaning of that Act," referring in s. 47, sub-s. 4, to the Act of 1863, and in ss. 49 and 50 to the Act of 1845. Secondly, there are provisions which would have been unnecessary if the tramroad were a railway. For instance, I find from s. 6 of the Act of 1896 that the tramway is to commence with a junction with the tramroad, from which it follows that the tramroad and tramway will be of the same gauge. If

C. A. 1907

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY v. THORNTON URBAN COUNCIL.

Buckley L.J.

the tramroad were a railway, the statute 9 & 10 Vict. c. 57 would compel its gauge to be 4 ft. 8½ in., and the gauge of both tramroad and tramway would be thus fixed. But the Act of 1896 thinks it necessary to provide by s. 35 that this tramroad and tramway shall have the gauge of 4 ft. 8½ in. Thirdly, if this tramroad were a railway, the general Acts relating to level crossings on railways (2 & 3 Vict. c. 45, 5 & 6 Vict. c. 55, s. 9, and 8 & 9 Vict. c. 20, s. 47) would govern it as regards level crossings, and would provide that the gates shall be kept open to the railway except when passage is required for road traffic. But the Act of 1896, s. 47, without any provision that these provisions shall not apply, contains other and inconsistent provisions, viz., an affirmative provision in sub-s. 1 that the company shall maintain gates across the tramroad; a provision in sub-s. 2, under which the gates are to be kept open to the highway except when passage is required for the railway; and sub-s. 3, which contemplates that, amongst other persons, the driver of the engine may be a person whose office or duty it may be to open or close the gates. Fourthly, there is in s. 85 a general clause by which the tramroad is to be subject to, not the provisions of any general Act relating to railways, but to the provisions of any general Act relating to tramways and tramroads. Lastly, the Amendment Act of 1898, s. 3, by a clause upon which I wish to say as little as possible, inasmuch as a serious question might arise upon it if circumstances called it into action, seems to contemplate that the undertaking, that is to say, the whole undertaking including the tramroad, is exposed to the contingency of being sold under the Tramways Act of 1870. There is the further point that while tramroads if they were railways would as regards conveyance of mails be governed by certain provisions contained in the Railway Acts with reference to that subject-matter, it was thought necessary by the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 3, to provide that tramroads authorized by any Act passed after 1893 should for the purposes of conveyance of mails be deemed to be railways. That Act speaks of three things, railways, tramways and tramroads. In 1893, therefore, the Legislature contemplated the existence of tramroads which are not railways.

The statute under consideration is of date 1896. All these are considerations which point consistently to the same conclusion. If this case is to be decided by the answer to the question whether this tramroad is a railway within the meaning of that expression as used in the Railways Clauses Act, 1845, and subsequent Acts, I answer that question in the negative.

The language of the Public Health Act, 1875, however, is "land used only as a railway constructed under the powers of any Act of Parliament for public conveyance." But for the deference which I pay to the judgment of my learned colleagues, I should have thought that that expression meant land used only for the construction of a railway under the powers of an Act for public conveyance, and for such railway when constructed. If the thing constructed cannot, having regard to the language of the Act which authorized its construction, appropriately be called a railway, I have difficulty in seeing that the language of the Act of 1875 is satisfied by saying that the land is used only as a thing which physically resembles in every particular a railway, meaning by "railway" in both parts of this sentence such a railway as is a railway within the Railways Clauses Act, 1845, and subsequent Acts relating to ways which are railways within the meaning of the Acts of 1845 and 1863. It is the fact, however, that this tramroad as used differs physically, as I understand, in no material particular from a railway such as that to which the Railway Acts apply, and as the other members of the Court are of opinion that under those circumstances it is a railway within the language of the Act of 1875, I bow to their judgment, although pure reasoning based upon logical principles would, if I had been sitting alone, have led me to a different conclusion.

Appeal allowed.

Solicitors: *Chester & Co., for Sutton, Elliott, Turnbull & Mayne, Manchester: Lees & Butterworth.*

W. C. D.

1907
Jan. 28, 29, 30;
***Feb.* 14.**

ENGLISH *v.* METROPOLITAN WATER BOARD.

Watercourse—Pumping Operations—Causing Water to Percolate out of Stream—Cause of Action.

The defendants were the owners of a well and pumping station situate at a distance of about 20 yards from a natural stream. This well was for 76 feet of its depth from the top lined with steel cylinders, so that no water from the adjacent soil could obtain access to the well except at a greater depth than 76 feet. The plaintiff was a riparian owner lower down the stream. The effect of the defendants' pumping from the well was that the general level of the water in the soil in the neighbourhood of the well was lowered to the extent of about twelve inches, with the result that the soil became dry, and a portion of the water flowing down the stream leaked out through the bed and side of the stream, so that the volume of the water in it was substantially diminished by the time it reached the plaintiff's land. None of the water, however, which so escaped from the stream in consequence of the defendants' pumping found its way into the defendants' well:—

Held, that as the defendants did not appropriate any of the water of the stream by pumping it up through their pipes, but merely caused it to sink a short distance into the ground by reason of their withdrawing the support of the lower subterranean water, the damage to the stream gave no cause of action.

Grand Junction Canal Co. v. *Shugar*, (1871) L. R. 6 Ch. 483, distinguished.

Trial before Lord Alverstone C.J. without a jury.

In the year 1900 the Kent Waterworks Company, who were the predecessors in title of the defendants, acquired by agreement certain land in the parish of Darenth, in the county of Kent, for the purposes of a pumping station. Through this land there runs a brook, which rises some 300 yards to the south of the southern boundary of the land, its source being springs of considerable volume which rise from the chalk to the surface, and it flows down a defined channel until it reaches a mill about half a mile to the north of the defendants' land and thence finds its way into the river Darenth. The plaintiff is the owner of certain land situate immediately to the north of the defendants' land, his land being bounded for a distance of 80 yards by the brook in question. The Kent Waterworks Company having acquired

the land above mentioned, sunk thereon, at a distance of about 60 feet from the bank of the brook, a well to the depth of 110 feet, the well being lined with steel cylinders from the top downwards to a depth of 76 feet, with the result that no water could find access to the well from the adjoining soil at a less depth than 76 feet. They also, with the object of increasing the volume of water coming to the well, sunk at a distance of 131 feet from the well a bore hole 250 feet deep. This bore hole was lined with steel tubing down to a depth of 91 feet, at which depth the tube was plugged. The bore hole was connected with the well at a depth of 101 feet from the surface by means of an adit six feet high by four feet wide. Over the well the company constructed a pumping station and erected machinery. In 1902 they commenced to pump. In the same year the undertaking of the Kent Waterworks Company, including the Darenth pumping station, was by virtue of the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), transferred to the defendants. Previously to the commencement of the pumping operations the brook, which flowed with a considerable volume of clear chalk water, and according to the evidence of the plaintiff's witnesses was never dry, winter or summer, afforded a good spawning bed and breeding ground for trout. Since, and in consequence of, the pumping operations by the defendants the quantity of water flowing down the brook past the plaintiff's property was substantially diminished, and in the year 1906, for a period of six weeks, it was practically dry opposite the plaintiff's land. It was admitted by the defendants that the effect of the pumping was to lessen the quantity of water leaving the northern boundary of the defendants' premises, as compared with that entering their southern boundary, by at least 16,000 gallons a day, and that amount of diminution was, as the Lord Chief Justice held, sufficient to give the plaintiff a cause of action, unless it was justifiable. None of the water, however, which had once been in the brook from its source 300 yards south of the defendants' premises down to their northern boundary, in fact got into the defendants' well or was pumped up by them. The diminution of the water in the brook as it left the northern boundary of the defendants' premises was due to the general fall in the level of the water in the

1907

ENGLISH v. METROPOLITAN WATER BOARD.

subsoil, or, in other words, to the withdrawal of the support of the body of underground water. In order to test the cause of diminution the defendants sunk eight trial holes in the neighbourhood of the well. From December 12, 1905, to January 8, 1906, the water in the well was kept by pumping at a level substantially 40 feet below ordnance datum, while during the same period the water in the trial holes stood at 36 feet above ordnance datum, or about 76 feet above the water in the well. Pumping was stopped by reason of a burst in the main from January 8 to January 15. Thereupon the water in the well rose in a period of less than two hours to a height of upwards of 70 feet, and upon the pump starting was reduced again to 35 feet below ordnance datum in a little over two hours, the water in the trial holes never varying more than 10 to 12 inches during the whole period. During the whole of the time that the pumps were running between December 12 and January 8, and subsequently to January 15, the quantity pumped was 1,750,000 gallons per day. This enormous quantity of water was derived, not from the surface water, but from a vast underground body of water flowing through the fissures of the chalk from south to north, and the abstraction or diminution of the water in the bed of the stream from its source down to the point where it leaves the plaintiff's land was due to the fact of the defendants' pumping slightly lowering the height of the subsoil water. Moreover, a chemical analysis of the water pumped up by the defendants shewed it to be a water of exceptional purity, without any trace of admixture of surface water.

The action was brought by the plaintiff as a lower riparian owner, the main ground of complaint being that the brook was in consequence of the defendants' pumping rendered valueless as a breeding ground for trout. He claimed damages and an injunction.

Tindal Atkinson, K.C., *Vesey FitzGerald*, K.C., and *Bailhache*, for the plaintiff. The plaintiff, as a riparian owner, is entitled to have all the water which has once found its way into the stream flow past his land undiminished in quantity by any acts of the defendants. Though the defendants may by pumping

intercept the underground water before it reaches the stream, when once it has got there they may not by pumping cause it to percolate out of the stream. The case is covered by the authority of *Grand Junction Canal Co.* v. *Shugar.* (1) There the appellants complained that the defendant, who represented a local board of health, had by drainage works caused water, which had been used to flow down a defined stream into a branch of the appellants' canal, to percolate out of the stream. Lord Hatherley granted an injunction restraining the defendant from continuing so to do. There the defendant had contended that the drainage operations had lowered the general underground water level, and that there were holes or fissures in the bed of a certain pond through which the stream in question ran, which had formerly been kept full of water at the old level, but were now empty, and that the water in the pond, having thus lost its support, ran into the chalk beneath through the holes or fissures; and it was contended that for the results of so withdrawing that support the defendant was not liable. To that contention Lord Hatherley's answer was: "As far as regards the support of the water all one can say is this: I do not think *Chasemore* v. *Richards* (2) or any other case has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all." A riparian owner is entitled to the support afforded to the water running in the stream by the subjacent water in the soil below, and that proposition is not negatived by the decision in *Popplewell* v. *Hodkinson.* (3)

Bankes, K.C., and *A. B. Shaw*, for the defendants. The abstraction of the water from the brook by the defendants is not actionable. First, it is authorized by statute. By an Act of 1877 the "limits" of the Kent Waterworks Company were expressed to include the parish of Darenth. By the Kent Waterworks

(1) L. R. 6 Ch 483. (2) (1859) 7 H. L. C. 349.
(3) (1869) L R. 4 Ex. 248.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

Act, 1888 (51 & 52 Vict. c. vi.) (1), it was provided by s. 10 that "subject to the provisions of this Act the company may maintain . . . . and use . . . . the pumping stations . . . . for the time being existing . . . . within their limits when and as they find it expedient so to do." That section negatives any nuisance that may necessarily and apart from negligence result from the use by the defendants of the Darenth pumping station. In *London and Brighton Ry. Co.* v. *Truman* (2) a railway company were authorized by their Act to purchase land in such places as should be deemed eligible for the purpose of providing additional stations and yards for receiving, loading or keeping cattle, &c.; the company bought land adjoining one of their stations and used it as a cattle yard, to the nuisance of the neighbouring houses. It was held that, the purpose for which the land was bought being expressly authorized by the Act, and being incidental to the authorized use of the railway for cattle traffic, the company were authorized to do what they did, and were not bound to choose a site where the use of it as a cattle yard would be less inconvenient to the plaintiffs, and that in the absence of negligence in the user they could not be restrained. That is exactly the present case. The defendants' predecessors had an absolute discretion to select the site most convenient to themselves without regard to its effect upon the adjoining proprietors. The defendants therefore are not liable unless they have been negligent, and there is no suggestion of any negligence here. It is

(1) By the Kent Waterworks Act, 1888, s. 8: "The company may within their limits upon lands acquired by or belonging to them from time to time make and maintain all necessary and convenient approaches embankments roads ways tunnels adits wells tanks filtering beds dams sluices outfalls channels conduits drains pipes engines works and conveniences for obtaining collecting filtering storing and distributing water for the purposes of their undertaking, but nothing in this section shall exonerate the company from any action indictment or other proceeding for nuisance in the event of any nuisance being caused by them."

Sect. 10: "Subject to the provisions of this Act the company may maintain manage regulate work and use and from time to time enlarge extend alter add to maintain or discontinue the waterworks buildings wells pumping stations mains pipes works and conveniences for the time being existing and worked or used by them within their limits when and as they find it expedient so to do."

(2) (1885) 11 App. Cas. 45.

true that by s. 8 of that Act, which authorizes the company from time to time to construct wells and other works incidental to the undertaking, it is provided that "nothing in this section shall exonerate the company from any action, indictment or other proceeding for nuisance in the event of any nuisance being caused by them." But that proviso was intended to be limited to nuisances arising from the construction of the works mentioned in the earlier part of the section, and not to include nuisances arising from the use of the works when constructed. But, even if it does include the latter, the mere abstraction of water from a stream is not a nuisance in the sense in which that term is there used. By the Kent Waterworks Act, 1902 (2 Edw. 7, c. cxvii.), after reciting in the preamble thereto that the company, in order to comply with their statutory obligations for the provision of a constant supply of water throughout their district, were then constructing additional pumping stations, and that it was necessary to raise further moneys for the purpose, power was given by s. 4 to raise money by the issue of debenture stock, and by s. 13 out of the money so to be raised a sum of 36,630*l.* was allocated "for the enlarging and improving of and for adits and tunnels and other works in connection with the pumping stations now in course of construction at Darenth" and certain other specified places. As the well had at that date been completely sunk and could not be used as a pumping station except with the result, as events have shewn, of draining the water out of the stream, that Act amounts to a statutory recognition of the company's right so to drain it.

Secondly, assuming that the defendants are not protected by statute, still no action will lie against them at common law. In the case of *Dickinson* v. *Grand Junction Canal Co.* (1) two claims were made against the defendants for damage to a river by their pumping operations—one for having intercepted underground water which would otherwise have flowed into the river, and the other for having drawn off through the intervening chalk and earth water which had actually formed part of the stream of the river. It was held by the Court of Exchequer that the defendants were liable in respect of both claims. That case was

(1) (1852) 7 Exch. 282.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

overruled in *Chasemore* v. *Richards* (1) so far as the first claim was concerned, and the reasoning upon which the House of Lords there proceeded equally goes to shew that the latter claim was also ill-founded. At all events, *Dickinson's Case* (2) can no longer be cited as a subsisting authority in favour of the plaintiff. Here the cause of the escape of the water from the brook is the withdrawal of the support afforded by the subsoil water. But the case of *Popplewell* v. *Hodkinson* (3) establishes that a landowner has at common law no right of support to his land from subterranean water, and no distinction can properly be drawn between support by water to land and support by water to water. *Grand Junction Canal Co.* v. *Shugar* (4), upon which the plaintiff relies, is not an authority for the proposition that pumping and thereby causing water in a stream to percolate out of it through the intervening soil is a cause of action. What Lord Hatherley there held that the defendant had unlawfully done was that he had directly tapped the stream by bringing his drain into immediate connection with it. It was as though he had directly inserted a pipe into the stream and drawn the water off through that pipe. This was the view taken of that case by Vaughan Williams L.J. in *Jordeson* v. *Sutton, &c., Gas Co.* (5), where he said: "With regard to *Grand Junction Canal Co.* v. *Shugar* (4), it seems tolerably clear from the longer report of this case in the *Law Times* that Lord Hatherley treated the case as one in which there was a direct *tapping* of an overground stream flowing in a defined channel, and not merely a *withdrawal* of percolating underground water indirectly affecting the underground (6) stream. . . . . I doubt whether Lord Hatherley really used the expression 'support of water.' I observe that the word which in the *Law Times* report he is reported as using is 'supply,' and not 'support.' The idea of the support of water by water seems to me inconsistent with the *unity* of water." (7)

(1) 7 H. L. C. 349.
(2) 7 Exch. 282.
(3) L. R. 4 Ex. 248.
(4) L. R. 6 Ch. 483.
(5) [1899] 2 Ch. 217, at p. 251.
(6) *Sic*, but "overground" seems required by the sense.
(7) Of the other contemporary reports the *Law Journal* contains no report of *Grand Junction Canal Co.* v. *Shugar*. But the *Weekly Reporter* (19 W. R. 569, at p. 571) agrees with the *Law Reports* in stating that the word used by Lord

With regard to the plaintiff's claim for an injunction, his interest in the stream, being confined to an 80 yards frontage, is in any event much too small to admit under the circumstances of that particular remedy.

Tindal Atkinson, K.C., in reply. The defendants have no statutory authority to drain this stream. Sect. 10 of the Kent Waterworks Act, 1888, on which the defendants rely, does not confer a power to use the pumping station without regard to the consequence to the adjoining landowners. The powers thereby given are "Subject to the provisions of this Act." Those words refer to s. 8, which expressly provides that "nothing in this section shall exonerate the company from any action . . . . for nuisance." That proviso is not confined in its operation to nuisances caused by the construction of the works, for the section expressly confers on the company power to maintain "works and conveniences for obtaining . . . . storing and distributing water." The proviso therefore extends to nuisance caused by pumping water. And that an interference with the flow of a stream is an actionable nuisance is clear from the ordinary definition of nuisance, which includes anything done to the hurt or annoyance of the lands, tenements or hereditaments of another and not amounting to a trespass. In *Jordeson* v. *Sutton, &c., Gas Co.* (1) the Court of Appeal held that the withdrawal of the support afforded to the plaintiff's land by an underground stratum of quicksand known as "running silt," whereby a subsidence

---

Hatherley was "support," and not "supply." The passage in the *Weekly Reporter* runs thus: "So far as regarded the support of the water he did not think *Chasemore* v. *Richards* or any other case had decided more than this, &c." That passage refers to the arguments of counsel, which, as given in the *Weekly Reporter*, were as follows: The Lord Chancellor having put the case of a person digging a hole close by a watercourse so as to abstract the water, counsel for the defendants argued, "It would be a question for the jury whether he directly abstracted the water. If a person without any improper intention, by a well or drain, taps underground springs, and thus removes the water which by its upward flow or pressure supported water belonging to his neighbour, and thereby not only is the supply cut off, but a counter-stream induced, he is not liable for that." The reference to the report in the *Law Times* is 24 L. T. 402.

(1) [1899] 2 Ch. 217.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

occurred, was a nuisance within the meaning of a corresponding clause in the Gasworks Clauses Act, 1871. The general discretion given to the defendants by s. 10 of the Act of 1888 to use their pumping station "when and as they find it convenient so to do" must not be understood as an absolute discretion. "It is clear," said Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (1), "that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to shew that, by express words or by necessary implication, such an intention appears." And Lord Watson in the same case said (2) that "Where the terms of the statute are not imperative but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights." Here there is no express statutory provision for the acquisition of this particular site for the purposes of a pumping station, but merely a discretionary power to make a pumping station where they think fit. With regard to the Kent Waterworks Act, 1902, it is enough to say that the power thereby given to raise money for the purposes of the works then being constructed cannot be regarded as a statutory sanction of the selection of this particular site, or as an authority to use it without regard to the consequences. In the ordinary course no notice would have been given to the adjoining landowners that Parliament was going to be asked to authorize the loan. Had they had the opportunity of appearing in opposition to the Bill they would have required the insertion of the ordinary clause as to compensation water, obliging the company to return into the stream so much of the water pumped up by them as was equivalent to the amount abstracted from the stream.

Then, assuming that there is no statutory protection of the defendants' acts, they cannot justify those acts at common law. So much of the decision in *Dickinson* v. *Grand Junction Canal Co.* (3) as decided that it is actionable to abstract water which

(1) (1881) 6 App. Cas. 193 at p. 208. (2) Ibid. at p. 213.
(3) 7 Exch. 282.

had actually formed part of a stream by sinking a well and causing it to percolate out of the stream through the intervening soil is still good law. It is in no way overruled by *Chasemore* v. *Richards* (1), where the Court had only to deal with the intercepting of underground water before it reached the stream. Indeed, it is the very proposition which Lord Hatherley meant to affirm in *Grand Junction Canal Co.* v. *Shugar*. (2) He there said: "The point most closely pressed on me by Mr. Eddis and Mr. Lindley was this—how can you distinguish the case of a well where the water has been secured from the case of this running water? That is answered at once by the decision in *Chasemore* v. *Richards* (1), and the distinction is plain. If you are simply using what you have a right to use, and leaving your neighbour to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is, ex concessis, a defined channel in which this water was flowing." What he there meant was this, that whereas, in the case of a conflict between the right of one person to enjoy the underground water percolating into his well and the right of his neighbour to pump the soil dry, the two rights are to be regarded as equal, so that the owner of the former right cannot complain if he is damaged by the exercise of his neighbour's right of pumping, the right to have water flow in a defined channel above ground is a superior right, which, in the event of a conflict with the neighbour's right of pumping, must prevail. So far from *Popplewell* v. *Hodkinson* (3) being any authority for the proposition that there is no right of support by water to water, it is very doubtful how far that case is even to be regarded as an authority for the supposed rule that there is no common law right of support by water to land. In *Jordeson* v. *Sutton, &c., Gas Co.* (4) both Lindley L.J. and Rigby L.J. said that *Popplewell* v. *Hodkinson* (3) was not to be taken as deciding that under no circumstances can there be a right of support to land from water, and that the application of that case ought not to be extended.

If the defendants cannot justify their acts, it seems clear that

(1) 7 H. L. C. 349.
(2) L. R. 6 Ch. 483, at p. 487
(3) L. R. 4 Ex. 248.
(4) [1899] 2 Ch 217.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

the plaintiff is entitled under the circumstances to an injunction. Wherever a right of property is interfered with by a person who asserts his legal right to interfere with it the plaintiff is entitled to an injunction, for otherwise the defendant might, by continuing the acts complained of for twenty years, acquire a statutory right to do them : per Lord Cairns, *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1)

Cur. adv. vult.

Feb. 14. LORD ALVERSTONE C.J., after stating the facts as above set out, proceeded as follows :—I have now to consider the legal questions which arise in this action, and it is, in the first instance, important to ascertain to what extent the defendants are justified in their contention that all they are doing is sanctioned by statutory authority. The first section on which reliance was placed by the defendants was s. 1 of 49 Geo. 3, c. clxxxix., which gave the proprietors of the Kent Waterworks power to purchase land. In my opinion that section was only enacted in order to get rid of the effect of the Mortmain Acts. My attention was not called to any section in any Act other than that already stated until the Kent Waterworks Act, 1888, which by its preamble extended the limits of the company's Acts and referred to the plans and sections of the works authorized by that Act. Those works were specified in s. 7, but it was agreed that that section in no way indicated or referred to the site at Darenth. Sect. 10 was in the following terms: "Subject to the provisions of this Act the company may maintain manage regulate work and use and from time to time enlarge extend alter add to maintain or discontinue the waterworks buildings wells pumping stations mains pipes works and conveniences for the time being existing and worked or used by them within their limits when and as they find it expedient so to do." It was mainly on s. 10 that the defendants relied as giving the company statutory power to carry out the works in question, and to pump the water as they have done.

Reliance was also placed on the Kent Waterworks Act, 1902,

(1) (1875) L. R 7 H. L. 697, at p. 705.

which recited: "Whereas the company in order to comply with their statutory obligations for the provision and maintenance of a constant supply of water throughout their district are now constructing additional pumping stations and mains which are immediately essential to meet the requirements of the rapidly increasing population in such district and it is necessary that such works and mains be proceeded with and completed without any delay and that the company be empowered to raise further moneys for this purpose and for the concurrent general purposes of their undertaking"; and by s. 13 authorized the expenditure of a sum of 36,630*l.* upon the enlarging and improving of and for adits and tunnels and other works in connection with the pumping stations now in course of construction at, among other places, Darenth, of which sum 2055*l.* for mains, and 10,150*l.* for pumping stations, with 10 per cent. thereon for contingencies, were by the schedule allocated to Darenth.

In my view it is immaterial whether these statutes can be construed as giving express statutory authority to do what is now being done. Sect. 8 of the Act of 1888, with which the Act of 1902 is incorporated, and under which it is suggested that the present works are constructed and maintained, expressly provides that "Nothing in this section shall exonerate the company from any action indictment or other proceeding . . . . in the event of any nuisance being caused by them." Mr. Bankes, on behalf of the defendants, contended that those words were to be applied to the construction of the works only, and not to their maintenance or working, which he said was included under s. 10. I cannot accept this view. I think that the words which I have quoted apply to the making and maintaining the tunnels, adits and wells, and the conveniences for collecting, storing and distributing water, and that the enabling words of s. 10 were not intended to limit the operation of the prohibition as to nuisance at the end of s. 8. The act complained of as giving rise to the cause of action is the alleged diminution, by reason of the operations of the defendants, in the flow of water in the brook, to which flow the plaintiff as riparian proprietor is entitled. It seems to me that such result, if brought about by an act in respect of which an action could be maintained, would be an

1907

ENGLISH v. METROPOLITAN WATER BOARD.

Lord Alverstone C.J.

action for nuisance. It is strictly in accordance with the definition of nuisance in Blackstone and many other text-books of great authority, but in addition in my opinion that point is expressly covered by the decision of the whole Court in *Jordeson* v. *Sutton, &c., Gas Co.* (1), to which case I have to refer in another connection. The Lords Justices there dealt with the meaning of the word "nuisance" in such a clause, and dismissed the argument that it was intended to apply to public nuisance only, and further pointed out that the existence of such a clause distinguished the case from that of *London and Brighton Ry. Co.* v. *Truman* (2), on which reliance was placed by Mr. Bankes. In my opinion, therefore, the statutes under which the defendants are working afford no protection if the acts of which the plaintiff complains give rise to a good cause of action at common law.

This conclusion brings me finally to the difficult question, Does the abstraction of water under the circumstances which I have already found to be established by the evidence in this case establish a cause of action by the plaintiff?

The case mainly relied upon by the plaintiff was *Grand Junction Canal Co.* v. *Shugar* (3), the result of which, as stated in the head-note, was that "although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land." This head-note does not sufficiently explain what is meant by the words "drawing off." Mr. Atkinson contended that any act of the defendants which caused a diminution of the volume of water which had once got into the body of the stream above the plaintiff's land was a "drawing off" within the language of Lord Hatherley. The passage he relied upon is as follows: "As far as regards the support of the water all one can say is this: I do not think *Chasemore* v. *Richards* (4), or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which

(1) [1899] 2 Ch. 217.
(2) 11 App. Cas. 45.
(3) L. R. 6 Ch. 483.
(4) 7 H. L. C. 349.

is in a defined channel and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity." If these words are to be taken in their full and literal meaning they clearly establish the proposition for which Mr. Atkinson contends. In my opinion, however, at any rate in this Court, it is not open to me to put so wide a construction upon them. That case received a good deal of consideration in the case, already cited, of *Jordeson* v. *Sutton, &c., Gas Co.* (1) I have myself examined the report of *Grand Junction Canal Co.* v. *Shugar* (2) in the *Law Times* (3), and I agree, if I may respectfully say so, with the view of that case taken by Vaughan Williams L.J. that Lord Hatherley treated *Shugar's Case* (2) as one in which there was direct tapping of an overground stream flowing in a defined channel, and not merely percolating water indirectly affecting the surface stream. It is quite true that Vaughan Williams L.J. was the dissenting judge, but I do not understand Lindley L.J. to have differed from the law laid down upon this part of the case. Lindley L.J. came to the conclusion (4) that that which caused damage to the plaintiff was the disturbance and removal of wet sand and not of some underground water, and the same view was adopted by Rigby L.J. (5), where he likened the case to the removal of loose soil which will fall down when the lateral support of similar soil is removed, rather than to that of water which may draw away other water; and it is in my judgment significant that neither Lindley L.J. nor Rigby L.J. relied upon or even referred in their judgments to *Grand Junction Canal Co.* v. *Shugar* (2), although it had been discussed in argument. I desire to say that if I had been satisfied that the defendants, by their operations, had directly drained or tapped

(1) [1899] 2 Ch. 217.
(2) L. R. 6 Ch. 483.
(3) 24 L. T. 402.
(4) [1899] 2 Ch. at p. 239.
(5) Ibid. at p. 242.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

Lord Alverstone C.J.

water from the brook which would otherwise have flowed past the plaintiff's property, I should have applied the principle of the judgment in *Shugar's Case* (1), and have given effect to the opinion which I expressed in delivering judgment in *Salt Union* v. *Brunner, Mond & Co.* (2), that the abstraction of water or soil by the direct act of an adjoining proprietor may afford ground for action; but, having regard to the judgment of the Exchequer Chamber in *Popplewell* v. *Hodkinson* (3), and for the reasons which I have given, I am of opinion that abstraction or diminution of quantity by the withdrawal of support does not come within the same principle.

Among the cases in which this question has been dealt with there is, of course, the case of *Chasemore* v. *Richards* (4), the effect of which I take to be as stated by Cotton L.J. in *Ballard* v. *Tomlinson* (5): "Now *Chasemore* v. *Richards* (4) simply decided this, as I understand it, that every man has a right to take all the underground water (by which I mean water going in no definite channel) which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbour will have no underground water in his own land or that the stream which he owns will be diminished in consequence of the underground water which had been so appropriated not coming into that stream." It is to be noted, however, from the last words of this passage, "not coming into that stream," that Cotton L.J. does not deal directly with the point on which the plaintiff relies, namely, that in this case, to use the Lord Justice's words, the water had come into the stream before the operations of the defendants diminished its quantity; but, notwithstanding the comments upon it by Rigby L.J. in *Jordeson's Case* (6), it seems to me that *Popplewell* v. *Hodkinson* (3) does decide that if the case is not one of direct abstraction, but of the withdrawal of support of subterranean water, no action can be maintained. The reasoning of Rigby L.J. (6) seems to me to shew that he recognized that *Popplewell* v. *Hodkinson* (3) did decide that, dealing with the question of support as distinguished from direct

(1) L. R. 6 Ch. 483.
(2) [1906] 2 K. B. 822.
(3) L. R. 4 Ex. 248.
(4) 7 H. L. C. 349.
(5) (1885) 29 Ch. D. 115, at p. 123.
(6) [1899] 2 Ch. 217 at pp. 242, 243.

1907

ENGLISH v. METROPOLITAN WATER BOARD.

Lord Alverstone C.J.

abstraction, no action lies against the adjoining owner who lowers the level of the sub-soil water, and this view is clearly expressed by Vaughan Williams L.J. (1), and there is nothing in *Bradford* v. *Pickles* (2) which tells against the view which I have expressed. In the earlier part of my judgment dealing with the facts, I have found as a fact that no water from the brook gets into or is pumped by the defendants' well, and that the only effect of the defendants' pumping is to lower the level of the sub-soil water underneath and at the sides of the brook from ten to twelve inches, with the result no doubt that this does cause a diminution in the quantity of the water passing the plaintiff's land; but this is a consequence of the withdrawal of support, and of that alone.

For these reasons I have come to the conclusion that, although the defendants are not expressly protected by statute, no action can be maintained against them by the plaintiff in respect of the abstraction of water. I have only to add that, had I taken another view of the case, it clearly is not in my opinion one for injunction. The damage occasioned by the abstraction of the water in the past is comparatively trifling, and under no circumstances should I have assessed the damages for its abstraction at more than 50*l*.

Judgment for the defendants.

Solicitors for plaintiff: *Deacon, Gibson, Medcalf & Marriott.*
Solicitor for defendants: *Walter Moon.*

(1) [1899] 2 Ch. 217 at p. 247. (2) [1895] A. C. 587.

J. F. C.

1907
Feb. 4, 5, 25.

CAIRN LINE OF STEAMSHIPS, LIMITED *v.* CORPORATION OF TRINITY HOUSE.

Ship—Tonnage—Light Dues—Deck Cargo—Coal carried on Deck for use on Foreign Voyage—"Timber, Stores, or other Goods"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 85—*Merchant Shipping* (*Mercantile Marine Fund*) *Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 5; *Sched. II.*

Sect. 85, sub-s. 1, of the Merchant Shipping Act, 1894, provides that if any ship, other than a home trade ship, carries as deck cargo, that is to say, in any uncovered space upon deck, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable.

Coals carried in an uncovered space upon the deck of a ship upon a foreign voyage, though intended for the use of the ship upon the voyage, are stores or other goods, and are therefore carried as deck cargo, within the meaning of that enactment.

Consequently, by s. 5 and Sched. II. of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, light dues are payable in respect of the tonnage of the space occupied by such coals so carried at the time at which those dues become payable.

Dicta in *Richmond Hill Steamship Co.* v. *Corporation of Trinity House*, [1896] 2 Q. B. 134, not followed.

Trial of action before Bray J. without a jury.

By s. 5, sub-s. 1, of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, it is enacted that on and after the commencement of that Act the general lighthouse authorities shall levy light dues with respect to the voyages made by ships or by way of periodical payment, and not with respect to the lights which a ship passes or from which it derives benefit, and that the dues so levied shall take the place of the dues theretofore levied by those authorities.

By sub-s. 2 of the same section the scale and rules set out in Sched. II. to the Act are to have effect for the purpose of the levying of light dues in pursuance of the Act.

By Sched. II. to the Act the scale of payments for light dues is $2\frac{3}{4}d.$ per ton per voyage for foreign-going steamers.

By r. 4 of the rules in the schedule the voyage of a foreign-going ship trading outwards is to be reckoned from the first port of

lading in the United Kingdom . . . . of cargo destined for a port outside home trade limits. By r. 6 dues payable per voyage are to be payable and collected only at ports where a ship loads or discharges cargo or passengers or mails.

By r. 8 a ship's tonnage is to be reckoned as under the Merchant Shipping Act, 1894, for dues payable on a ship's tonnage, with the addition required in s. 85 (1) of that Act with respect to deck cargo.

The following facts were agreed between the parties: 1. The plaintiff's steamship *Cairntorr* left Penarth in April, 1906, for a voyage to Buenos Ayres carrying 4924 tons of coals shipped by Messrs. Cory Brothers, Limited, under bills of lading. The said 4924 tons were carried in the ship's holds. In addition the *Cairntorr* took on board 1291 tons of coal, of which 1127 tons were put in the ship's bunkers, 64 tons in the poop, and 100 tons on the awning deck. None of the said 1291 tons were shipped under bills of lading or so as to earn freight. They had been bought by the plaintiffs for use on board in the ship's fires.

2. On the voyage out to Buenos Ayres the whole of the said 100 tons stored on the awning deck was transferred from the awning deck into the thwartship bunkers and consumed in the boiler fires.

It was alleged in the statement of claim and admitted by the defendants in their defence that, as the authority charged with the collection of light dues, the defendants, by the collector of customs at Cardiff as their agent, demanded as due under the Merchant Shipping Act, 1894, and the Merchant Shipping (Mercantile Marine Fund) Act, 1898, in respect of the said vessel and in respect of the said voyage, and compelled the plaintiffs to pay, light dues amounting to 6*s.* 10*d.* on the tonnage space

(1) The Merchant Shipping Act, 1894, s. 85: "(1.) If any ship, British or foreign, other than a home trade ship as defined by this Act, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable."

1907

CAIRN LINE OF STEAMSHIPS, LIMITED v. TRINITY HOUSE CORPORATION.

occupied by the 100 tons of coal stored on the awning deck as aforesaid.

The plaintiffs, in order to get their ship cleared at the customs house, and to avoid detention, paid under protest the sum demanded, and brought this action to recover the money so paid.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiffs. In order to justify the exaction of these dues the defendants must shew that the plaintiffs' ship was carrying as deck cargo timber, stores, or other goods in the words of s. 85 of the Merchant Shipping Act, 1894. It is said that in carrying the 100 tons of bunker coal on the awning deck the ship was carrying stores as deck cargo. But these coals were not carried as cargo in any sense; they were not intended for transport from one country to another. Neither were they stores within the meaning of s. 85 of the Merchant Shipping Act, 1894; the word "stores" in that section means stores intended for the fitting out of other ships. Stores intended for the ship herself are not cargo: per Kay L.J., *Richmond Hill Steamship Co.* v. *Corporation of Trinity House.* (1) The words "timber" and "other goods" clearly come within the category of cargo, i.e., goods carried for reward; it would be strange drafting to introduce between those two kinds of cargo something which is not cargo at all. Therefore stores mean something in the nature of cargo—that is to say, stores for other ships, and not for the use of the carrying ship. At any rate, the word must mean something different from bunker coal, because among ships exempted by Sched. II. to the Merchant Shipping (Mercantile Marine Fund) Act, 1898, from the dues prescribed are "ships putting in for bunker coal, stores, or provisions for their own use on board." The goods described in sub-s. 1 of s. 85 of the Act of 1894 occupying the space the tonnage of which is to be added to the ship's registered tonnage are concisely described in sub-s. 4 as deck cargo, a well-known term which includes only goods carried for freight. This is borne out by the scheme for ascertaining the registered tonnage of a ship prescribed by ss. 77 and 78 of the Merchant Shipping Act, 1894;

(1) [1896] 2 Q. B. 134.

the cubical contents of the ship are first ascertained, and the tonnage of the vessel is calculated upon that basis as directed by s. 77 and the rules in Sched. II. to that Act. From the tonnage so found is deducted by s. 78 the tonnage of a space attributable to machinery and boilers, which has always been taken to include a space for coal bunkers. In this way the registered tonnage of a ship is arrived at, the principle being that the space devoted to earning shall be included, while that devoted to expenditure is excluded. Coal for the ship's fires, whether stored on deck or in bunkers, falls on the side of expenditure, and is therefore not intended to be included in the expression "deck cargo" in s. 85.

Pickford, K.C., and *Bateson*, for the defendants. Light dues are charged not upon coals or other goods themselves, but upon the space occupied by them. The dues are charged upon the tonnage of the ship (which is based upon the cubical capacity) after deducting the tonnage of certain spaces, the deduction of which is authorized by s. 78 of the Merchant Shipping Act, 1894. No deduction is allowed in respect of the space occupied by the ship's bunkers. Coal in bunkers is subject to these dues, and there is no reason why coal stored on deck should be exempt. It is expressly included in the ship's registered tonnage by s. 85 provided it fulfils two conditions: the first condition is that it be carried "as deck cargo"; this expression is defined by the section itself, and means that which is carried "in any uncovered space upon deck." There is no condition that it shall be carried under any contract of affreightment. That this coal was carried in an uncovered space upon deck is not disputed. The second condition is that it should be "timber, stores, or other goods." It was "stores or other goods" within the meaning of that phrase, which includes stores for the use of the ship herself. That is the meaning of the word "stores" in the list of exemptions appended to Sched. II. to the Merchant Shipping (Mercantile Marine Fund) Act, 1898, where it is coupled with bunker coal and provisions for the ship's own use. The word must have the same meaning in both these enactments passed in pari materia.

J. A. Hamilton, K.C., in reply. In a taxing Act the charge must be imposed in clear terms or not at all. The burden lies upon the defendants to justify the charge. If the statute

1907

CAIRN LINE OF STEAMSHIPS, LIMITED v. TRINITY HOUSE CORPORATION.

falls short of a clear justification the plaintiffs are entitled to judgment.

Cur. adv. vult.

Feb. 25. BRAY J. read the following judgment: — The question in this action is whether a sum of 6*s.* 10*d.* was rightly payable by the plaintiffs to the defendants for light dues on the plaintiffs' steamship *Cairntorr* on a voyage with a cargo of coal from Penarth to Buenos Ayres. The plaintiffs paid this sum of 6*s.* 10*d.* under protest, and seek to recover it back.

According to the agreed statement of facts the *Cairntorr* when she started from Penarth, had 100 tons of coal on the awning deck. This coal was part of 1291 tons bought by the plaintiffs for use on board in the ship's fires. In the course of the voyage out these 100 tons were transferred into the thwartship bunkers and consumed in the boiler fires. It was in respect of the space occupied by this 100 tons that the 6*s.* 10*d.* was paid.

The defendants claim that light dues were payable in respect of this space under the combined effect of r. 8 in Sched. II. of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, and s. 85 of the Merchant Shipping Act, 1894; and the question turns on the true construction of the last-mentioned section.

That section, omitting unnecessary words, is as follows: "If any ship carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable."

The point in dispute is whether this coal was "timber, stores, or other goods" so carried. The first duty of the Court in construing a statute is to see what is the natural meaning of the words used; and the first word which has to be construed is "deck cargo." The plaintiffs contend that deck cargo means freight-earning cargo carried on deck. Now the statute here has, as it seems to me, given a special definition of the word "deck

cargo." That, I think, is the natural effect of using the words "that is to say." It first uses a word, capable, I think, of more constructions than one, and then it defines its meaning. I cannot interpret the words "that is to say" in any other way. I think the word "deck cargo" is large enough to include goods that are not freight-earning, and it seems to me that the definition shews that it is intended to have that larger meaning here. I find that the word "cargo" is not repeated anywhere in the definition. If it had been intended that it should be confined to cargo in the sense of freight-earning cargo, I think the words used would have been something of this kind, "that is to say, as cargo in any uncovered space, &c." Next, I think the words "timber, stores, or other goods" shew that it was not to be confined to freight-earning cargo. The word "stores" must, I think, include ship's stores carried for the use of the ship herself.

The word "stores" is frequently used in the statute and in the rules as denoting, or at all events as including, the ship's own stores. Now ship's stores carried for the use of the ship herself are no more freight-earning than bunker coals. If this be so the word "deck cargo" cannot be construed as confined to freight-earning cargo, and there is no reason for limiting the words "other goods" to freight-earning goods. If they are not so limited the words "other goods" are quite wide enough to include bunker coal. The view contended for by the plaintiffs really involves the ignoring or omission of the important words "that is to say."

Having arrived, therefore, at what I have considered to be the natural construction of this section, I have to ask myself whether there is any reason why this natural construction should not be taken as the true construction. Why should it not have been intended that bunker coal carried on deck should pay light dues? It is important to see how far bunker coal in the bunkers pays light dues. Is the space occupied by the bunkers reckoned in arriving at the registered tonnage? Sects. 77 to 81 of the Act of 1894 and the rules in the schedule provide for the measurement of the ship and tonnage. The matter seems to stand thus. The space occupied by the bunkers is included in the gross tonnage, but a deduction is made for the space occupied by the

1907

CAIRN LINE OF STEAMSHIPS, LIMITED v. TRINITY HOUSE CORPORATION.

Bray J.

propelling power, and in arriving at the latter amount an addition is made to the space actually occupied by the boilers and machinery: see s. 78. I think it may be assumed that at all events one of the reasons for making this addition is the fact that space will be required for bunker coal and that some deduction should be made for that; but it is plain that if the ship is carrying more than what the statute has assumed to be the normal amount of coal required for the boilers and machinery, the extra space so occupied will pay light dues. If a ship has bunkers larger than the normal, she has to pay for the extra space. Why should she not pay if she has smaller bunkers, but carries bunker coal on deck to make up the amount required for the voyage? The statute might have provided that all space actually occupied by bunker coal should be deducted. It has not done so. It has thought it better to make an average deduction which involves payment for extra space so occupied, and there is no reason why payment should not be made for that space wherever it is. The shipowner or charterer may put his coal where he likes; he pays for all space occupied, less the statutory deduction. It seems to me therefore that, if I am to consider what the Legislature is likely to have done, my answer must be that it is likely to have made the ship pay for the space occupied by bunker coal on deck, and so also for ship's stores carried on deck. There is no reason, therefore, that I can find why I should not adopt the construction which I have arrived at as the natural construction.

I have now to consider the case of *Richmond Hill Steamship Co.* v. *Corporation of Trinity House.* (1) I think it must be taken that the language used by all the learned judges in that case implies that they had it in their minds that deck cargo meant freight-earning cargo. It certainly was not necessary to decide that point, because the horses and cattle were undoubtedly freight-earning cargo. The dicta were therefore obiter dicta, and I am not bound by them unless I can see that they formed the ratio decidendi; and I do not consider that they did so. The argument of counsel for the ship was that "other goods" must be construed as ejusdem generis with timber and stores. The Court rejected this and adopted the

(1) [1896] 2 Q. B. 134.

natural meaning. That was their ratio decidendi. Still there remains the fact that the Court entertained an opinion contrary to the one I have formed, and if I could see that they adopted this opinion after argument I should think it right to follow it. I cannot find any trace of the point having been argued. I think it is not an unnatural opinion to form on first consideration. I formed the same opinion on hearing Mr. Hamilton's argument, but after hearing Mr. Pickford my opinion changed. I am not convinced that those learned judges would not also have changed their opinion if they had had the advantages I have had. I think the opinion of Kay L.J. was the most pronounced. He says: "It was argued that 'stores' meant in this section ship's stores. If so, it would appear that it must mean stores intended for the fitting out of other ships, because stores belonging to the ship herself would not be cargo; but I do not think that the word has the limited meaning which is suggested. It appears to me to mean stores of any kind carried on deck." I am not sure that I understand this passage. If the learned judge means that ship's stores carried by the ship on deck for her own use are not deck cargo within the meaning of the section I cannot agree with him, and the fact that the ship's stores so carried are in my opinion deck cargo helps me, indeed almost forces me, to the conclusion that bunker coal is also deck cargo. This case has made me hesitate much before adopting the view which I have taken; but, as I am not bound by it, I think I must give effect to my own opinion, which is that the bunker coal carried on deck on this ship was "deck cargo" according to the meaning of that word in that section, and therefore that the 6*s*. 10*d*. was rightly payable and the plaintiffs' action fails. There must be judgment for the defendants with costs on the High Court scale.

Judgment for the defendants.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Sandilands & Co.*

W. H. G.

1906
Dec. 4, 5.
1907
Jan. 11.

DEWAR *v.* GOODMAN.

Landlord and Tenant—Covenant running with the Land—Covenant by Lessor to perform Covenants of Head Lease and in default to indemnify Lessee—Collateral Covenant—Enlargement of Covenant for Quiet Enjoyment.

Where an underlease contains a qualified covenant for quiet enjoyment by the underlessor with the underlessee, i.e., that the underlessee may quietly enjoy the premises free from interruption by the underlessor or any other person claiming under or in trust for him, and the underlease also contains a covenant that the underlessor will perform the covenants of the superior lease so far as they relate to premises included in the superior lease, but not demised by the underlease, the latter covenant does not enlarge the covenant for quiet enjoyment into an absolute covenant, so as to make the underlessor liable to an action at the suit of the underlessee for damages for a lawful disturbance of the underlessee by the superior landlord.

A covenant by the underlessor with the underlessee that the underlessor will perform the covenants and conditions of the superior lease so far as they relate to premises included in the superior lease, but not demised by the underlease, and will keep the underlessee indemnified from all loss he shall suffer from the breach thereof, does not run with the land so as to bind the assignee of the underlessor, even though the underlessor covenants for himself, his heirs, executors, administrators and assigns, and the underlease contains a proviso that the covenants and indemnity on the part of the underlessor were entered into and given by him with the intention of binding such underlessor, his real and personal representatives, only whilst he and they continued to hold the reversion expectant on the term granted by the underlease, and of binding so far as could be any other person or persons for the time being entitled to that reversion; inasmuch as the covenant to perform the covenants in the superior lease relating to premises not demised by the underlease is only a collateral covenant, and the covenant to indemnify is personal.

Action tried before Jelf J. without a jury.

The facts (so far as material to this report) were as follows:—

The action was brought by the plaintiff Dewar, as assignee of an indenture of underlease dated July 13, 1886 (demising a parcel of land in Chelsea with two houses upon it), against the defendant Reginald Goodman, as assignee of an indenture of lease dated May 6, 1820, to recover damages for breach of covenants contained in the underlease of July 13, 1886.

The lease of May 6, 1820, was from Lord Pomfret and others

to William Whitehead for eighty-nine years, and contained, amongst others, a covenant by the lessee to keep all buildings erected on the land in good repair and a proviso for re-entry on breach of the said covenant.

At the date of the underlease of 1886 the lease had become vested in one Barns for the residue of the term.

By the indenture of underlease made between Barns, "who and whose heirs, executors, administrators, and assigns were therein referred to as the lessor," and Humphrey, "who and whose heirs, executors, administrators, and assigns were therein referred to as the lessee," a part of the land demised by the lease of 1820 together with two houses thereon were demised to the lessee for twenty-two and a half years, less three days, subject to a peppercorn rent and to the covenants and conditions therein contained. The underlease contained—(1.) a covenant by "the lessor" with "the lessee" for quiet enjoyment; (2.) a covenant for the performance by "the lessor" of the several covenants and conditions contained in the indenture of lease of 1820 so far as the same related to or affected that part of the property included in the lease of 1820, but not demised by the underlease of 1886; and (3.) a covenant of indemnity.

The said covenants and indemnity were respectively as follows: "And the lessor doth hereby covenant promise and agree to and with the lessee that such lessee well and truly paying the said yearly rent hereby reserved if and when demanded and observing fulfilling and keeping the covenants clauses conditions and agreements herein before mentioned and contained and on the part and behalf of such lessee to be observed performed fulfilled and kept shall and lawfully may peaceably and quietly enter into and upon have hold use occupy possess and enjoy the said premises hereby demised or expressed or intended so to be and every part thereof with the appurtenances for and during the said term hereby granted without any let suit trouble molestation disturbance interruption or denial of from or by the lessor or any other person or persons claiming under or in trust for such lessor. And further that such lessor will or shall at all times hereafter during the said term pay the whole of the yearly rent reserved by and observe perform or comply with the several covenants

1906

DEWAR v. GOODMAN.

and conditions contained in the indenture of lease dated the 6th day of May 1820 under which the lessor holds the said premises and which on the part of the lessee or assignee therein named are or ought to be paid observed or complied with respectively so far as such covenants and conditions relate to or affect that part of the premises included in the said indenture of lease which is not hereby demised. And also that such lessor will or shall from time to time and at all times hereafter save harmless and keep indemnified the lessee and the estate and effects of such lessee from and against all actions suits and other proceedings which shall be commenced or prosecuted against the lessee and all costs losses damages and expenses which such lessee shall respectively incur or suffer by reason of the non-payment of the said rent or the non-observance or non-performance of all or any one or more of the several covenants and conditions reserved and contained by and in the said indenture of lease so far as the said covenants and conditions relate to or affect that part of the premises included therein which is not hereby demised."

It was with reference to these covenants and the indemnity, especially the covenant No. 2, that the legal question which had to be decided in the action arose. The underlease ended with the following proviso: "Provided always and it is expressly agreed and declared by and between the parties hereto that the covenants and indemnity lastly herein before contained on the part and behalf of the lessor are entered into and given by him with the intention of binding such lessor his real and personal representatives only whilst he or they continue to hold the reversion expectant upon the term hereby granted and of binding so far as can be any other person or persons for the time being entitled to such reversion."

On February 16, 1903, the plaintiff became the assignee of the underlease of 1886 for the residue thereof. On September 24, 1904, the Chelsea Development Company, Limited, acquired the reversion expectant on the determination of the term created by the lease of 1820. Ultimately all the land demised by the lease of 1820, except certain portions previously disposed of, but including the portion demised by the underlease, became vested

1906

DEWAR v. GOODMAN.

in the defendant for the residue of the term granted by the lease of 1820, subject to the underlease of 1886.

It was admitted that the defendant had broken the lessor's covenant contained in the underlease of 1886 in failing to perform the covenants to repair contained in the lease of 1820, and to comply with a notice served on September 29, 1904, on the defendant or his predecessor in title by the Chelsea Development Company, Limited, to repair 209 houses on that part of the land not comprised in the underlease of 1886 and the two houses comprised in that underlease. Consequently in February, 1905, the company sued the defendant in the King's Bench Division, and in December, 1905, obtained judgment for possession of all the property demised by the lease of 1820 (except the portions mentioned above which did not become vested in the defendant). The plaintiff was ejected under the judgment, and lost the rent of the property held by him under the underlease. It was agreed that if the plaintiff should be held entitled to recover in this action the damages should be 154*l.* 11*s.* 6*d.*

W. Copping, for the plaintiff. The effect of the covenant in the underlease of 1886 that the lessor will perform the covenants in the superior lease with regard to land not included in the underlease is to enlarge the covenant for quiet enjoyment in the underlease into a covenant against disturbance by the superior landlord by virtue of a breach of covenant contained in the lease of 1820. The benefit and burden of covenants (1.) and (2.) in the underlease of 1886 run with the land and reversion respectively. A statutory right of action was given to the assignee of a term against the assignee of the reversion in respect of breaches of covenants of this kind by 32 Hen. 8, c. 34. By that statute the burden of the covenant is to run with the reversion.

In *Spencer's Case* (1) it was resolved that a covenant by the lessee to do something upon the land demised, e.g., to build a wall, does not bind the lessee's assignee if the assigns are not named, but does bind the assignee if the assigns are named in the covenant. The present case is the converse of *Spencer's*

(1) (1582) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.

1906

DEWAR v. GOODMAN.

Case (1), and the same propositions of law apply. The covenants (1.) and (2.) run with the land and bind the defendant, inasmuch as the assigns are named. By a "collateral personal covenant" is meant one which is beneficial to the lessee without regard to his continuing owner of the estate. In the present case the covenants (1.) and (2.) are not merely "collateral personal covenants," because they are not beneficial to the lessee if he parts with his estate. They are necessary for the preservation of the plaintiff's estate, and remain of benefit to him simply for that reason. He has no other interest in it. Therefore they cannot be collateral. Upon the assumption that the covenant to observe the covenants in the superior lease enlarges the covenant for quiet enjoyment, *Campbell* v. *Lewis* (2) is conclusive in favour of the plaintiff, for it shews that a covenant for quiet enjoyment runs with the land.

The judgment of Best J. in *Vernon* v. *Smith* (3) shews that if a covenant is given with respect to the thing demised, and is co-extensive with the estate of the person with whom it is made and is made for the covenantor and his assigns, it binds the assigns of the covenantor. The only question is, Does the covenant concern the thing demised? In Foa on Landlord and Tenant, 3rd ed. at p. 381, it is said that "The following are further illustrations of such covenants or agreements" (i.e., which do not impose liabilities on the assignee): "on the part of the lessor a covenant to perform the covenants of a head lease or in default to indemnify the lessee"; and the same proposition is laid down in Woodfall on Landlord and Tenant, 17th ed. p. 187, and Leake on Contracts, 5th ed. p. 863. But in *Doughty* v. *Bowman* (4) the ground of the judgment was that the assigns were not named in the covenant. The decision in that case shews that if the assigns are named, as in the present case, the assignees are bound. The editors of those works have failed to notice the true ground of the judgment in *Doughty* v. *Bowman*. (4) The meaning of the judgment is that if the assigns had been named they would have been bound.

(1) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.
(2) (1820) 3 B. & A. 392.
(3) (1821) 5 B. & A. 1.
(4) (1848) 11 Q. B. 444.

[*Clegg* v. *Hands* (1) and *Noakes & Co.* v. *Rice* (2) were also referred to.]

Atherley-Jones, K.C., and *Sydney Goodman*, for the defendant. The foundation of a covenant running with the land as between lessor and lessee is privity of estate. The covenants in the underlease of 1886 do not affect the land demised by that underlease. *Spencer's Case* (3) shews that in order to bind the assignee the covenant must be with regard to a thing in esse, parcel of the demise; the covenant must not be with regard to anything outside the land demised. *Doughty* v. *Bowman* (4) turned on a point of indemnity. In *Minshull* v. *Oakes* (5) the Court expressed a doubt as to the ratio decidendi in *Doughty* v. *Bowman*. (4) A covenant has never been held to run with the land unless it has related to a thing in esse and parcel of the demise. In every case, without exception, where a covenant has been held to run with the land it has been a covenant that something shall be made, done or suffered on the land demised. In *Vernon* v. *Smith* (6) there was a covenant to insure, which is of the same nature as a covenant to repair. In *Clegg* v. *Hands* (1) there was a covenant that something should be done on the land demised. The covenant was beneficial to the business carried on upon the land demised, and it was accordingly held that the covenant ran with the land. That case could have been decided upon grounds not connected with the question whether the covenant ran with the land. In *Thomas* v. *Hayward* (7) there was a breach of a covenant not to build a public-house within half a mile of the demised premises. As the covenant was not with reference to a public-house on the land demised, it was held that the covenant did not run with the land. In *Doughty* v. *Bowman* (4) the covenant was to be performed on the land demised, but it was with regard to a thing in posse and not in esse, and it was therefore held that in order to bind the assigns they must be named.

Two subjects material to the present case are dealt with in the

(1) (1890) 44 Ch. D. 503.
(2) [1902] A. C. 24.
(3) 5 Rep. 16; 1 Smith, L. C. 11th ed., p. 55.
(4) 11 Q. B. 444.
(5) (1858) 2 H. & N. 793.
(6) 5 B. & A. 1.
(7) (1869) L. R. 4 Ex. 311.

1906

DEWAR v. GOODMAN.

text books: (1.) as to covenants in the head lease; (2.) as to the thing to which the covenants relate not being in esse. In Foa on Landlord and Tenant, 3rd ed. p. 377, it is laid down that "a covenant ought to run with the land, if it is of such a nature that it directly affects the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him." At p. 381 it is said that among collateral covenants is a covenant on the part of the lessor to perform the covenants of a head lease, or in default to indemnify the lessee.

The same propositions are contained in Woodfall on Landlord and Tenant, and Leake on Contracts. *Gower* v. *Postmaster-General* (1) is a direct authority in favour of the defendant in the present case. All the authorities up to the year 1834 are summed up in *Keppell* v. *Bailey*. (2) In 1 Smith's Leading Cases, 11th ed. at p. 72, it is said that, "Moreover, the covenant may well be said to be annexed, not to the thing not in esse, but to the land itself upon which the thing is to be made or done, and in respect of which, and not of the thing not in esse, there is the privity of estate, which is the foundation of the running of covenants." That passage shews that privity of estate is essential in order that a covenant may run with the land.

The covenant in the present case is merely a covenant of indemnity. In Foa on Landlord and Tenant, at pp. 381 and 382, it is pointed out that neither covenants to renew, options to purchase, nor covenants to keep the land stocked with game run with the land. It follows that a covenant for the breach of which a tenant may be ejected, and which therefore affects the security of his estate, may not run with the land. Therefore the test as to whether a covenant runs with the land is not whether it affects the security of the estate. *Vernon* v. *Smith* (3) and *Clegg* v. *Hands* (4) are distinguishable. In those cases the covenants were with respect to matters to be done on the land. Where, as in *Thomas* v. *Hayward* (5) a covenant is to do something off the land demised, it has always been held to be collateral and not to run with the land, even though it is necessary for the security

(1) (1887) 57 L. T. 527.
(2) (1834) 2 My. & K. 517.
(3) 5 B. & A. 1.
(4) 44 Ch. D. 503.
(5) L. R. 4 Ex. 311.

of the lessee's estate that it should be observed. Therefore, the fact that the covenant is necessary for the security of the lessee is not the point which determines whether it runs with the land.

[*Stevens* v. *Copp* (1), *Brewster* v. *Kitchell* (2), and *Mayor of Congleton* v. *Pattison* (3) were also referred to.]

Copping, in reply. A purchaser of the reversion expectant on the underlease would, as a matter of course, have an abstract of that and all other underleases which had been granted. If he did not require the abstract he ought to have done so. The assignee either did receive or ought to have received notice of all the covenants contained in underleases: *Bally* v. *Wells.* (4) The authorities cited on behalf of the defendant deal with personal collateral covenants, and therefore have no bearing upon the present case. *Clegg* v. *Hands* (5) is a conclusive authority in favour of the plaintiff.

Cur. adv. vult.

1907. Jan. 11. The following judgment was read by

JELF J., who, having stated the facts above set out and expressed the opinion that it was doubtful whether the proviso with which the underlease of 1886 ended had any legal effect, continued:— On this state of facts it was contended on the part of the plaintiff that the covenant in the indenture of the underlease of 1886 to perform the covenants in the lease of 1820 as to the property not comprised in the underlease ran with the land at common law, and by virtue of the statute 32 Hen. 8, c. 34, s. 2, bound the assignee of the reversion. The Conveyancing Act, 1881, does not seem to alter the law on the subject in any way material to this case. For the defendant it was contended that the covenant was merely collateral, and that the benefit of it did not pass to the plaintiff nor the burden of it to the defendant. Mr. Copping, in his able argument for the plaintiff, admitted at once that according to the text books (Woodfall on Landlord and Tenant, 17th ed. p. 187; Foa on Landlord and Tenant, 3rd ed. (1898) p. 381, &c.)

(1) (1868) L. R. 4 Ex. 20.
(2) (1697) 1 Salk. 198.
(3) (1808) 10 East, 130.
(4) (1769) 3 Wils. 25.
(5) 44 Ch. D. 503.

1907

DEWAR v. GOODMAN.

Jelf J.

covenants like those in question are placed in the category of collateral covenants and do not run with the land. But he maintained that the case cited in support of this view, viz., *Doughty* v. *Bowman* (1) (to be considered presently), so far from bearing it out, was really an authority in favour of the plaintiff. It therefore becomes necessary to examine the foundation of the distinction between covenants which run with the land and the reversion on the one hand and collateral covenants on the other.

Turning to the leading case on the subject, namely, *Spencer's Case* (2), we find it laid down in the 2nd and 6th resolutions that even where the parties shew by using express words their intention that the benefit and the burden of the covenant, as the case may be, should pass to the respective assignees, which seems to be the case here, yet if the thing to be done be merely collateral to the land and "doth not touch or concern the thing demised in any sort" the covenant does not run with the land. The question, then, is on which side of the line does the main covenant in question in the present case fall. This depends upon the further question whether it touches or concerns the thing demised. In other words, is it within the scope of the privity of estate or not? for it is upon the privity of estate that the running of covenants depends: see Notes to 1 Smith's L. C. 11th ed. p. 72. An ordinary restricted covenant for quiet enjoyment, such as the one in this underlease, in which a lessor covenants against disturbance by himself or anyone claiming under him, runs with the land, because it concerns the security of the actual thing demised: see *Campbell* v. *Lewis*. (3) And one contention of Mr. Copping on behalf of the plaintiff was that in the present case the effect of covenant No. 2 is to enlarge the ordinary restricted covenant for quiet enjoyment into a covenant for quiet enjoyment without interruption by the head landlord on account of breach of covenant by the defendant. But this seems to me to be only indirectly setting up that the covenant to perform the covenants of the head lease runs with the land and the reversion, and I think the latter proposition must be dealt with directly by itself and not by blending it with a separate covenant.

(1) 11 Q. B. 444.
(2) 5 Rep. 16; 1 Smith, L. C. 11th ed. p. 55.
(3) 3 B. & A. 392.

Many cases were cited on both sides, but the nearest to the present case was that already mentioned, viz., *Doughty* v. *Bowman*. (1) Each party claimed this decision as being in his favour. The covenant there was that the lessor of an underlease, his heirs, executors, or administrators (not adding assigns), would perform or indemnify the underlessee against all covenants in the head lease. One of such covenants in the head lease was that the lessee, his heirs, executors, or assigns, would build certain houses on the land demised, which covenant had been broken, and the head landlord entered and ejected the plaintiff, the assignee of the underlessee. This covenant in the underlease was held by the Court of Queen's Bench not to run with the land, apparently on the ground that the covenant to perform the covenants of the head lease was equivalent to a reinsertion in the underlease of a covenant to build houses on the land, and that such a covenant related to a thing not "in esse," and did not run with the land and bind the reversioner because assigns were not named, and also because the covenant amounted only to an indemnity which was merely a personal covenant. The Court of Exchequer Chamber upheld the decision apparently on the same grounds: Baron Parke (2) does say that the covenant in question would not have bound the assignee of the reversion to build, because it only professes to bind his executors or administrators.

Mr. Copping, on behalf of the plaintiff, says that this means that if assigns were named the covenant would have run with the land and reversion.

Mr. Atherley-Jones, for the defendant, replies that this does not follow: see *Minshull* v. *Oakes* (3), where considerable doubt is thrown upon the soundness of the distinction between cases where the assigns are and those where they are not named. On the whole, *Doughty* v. *Bowman* (1) does not seem to me to be conclusive of the present case either way. As to the indemnity, the covenant to indemnify in the present case is a separate covenant which does not, I think, control the covenant in question, and this differentiates the two cases so far as that point is concerned.

(1) 11 Q. B. 444. (2) Ibid. at p. 454.
(3) 2 H. & N. 793.

1907

DEWAR v. GOODMAN.

Jelf J.

The covenant for quiet enjoyment, then, is not broken and the covenant to indemnify is only personal.

On principle, Mr. Copping argued on behalf of the plaintiff that the covenant in question for performance of the covenants of the head lease does pro tanto touch or concern the thing demised in that, if performed, it secures the possession of it by preventing eviction on that ground by the superior landlord, and if not performed it forfeits the underlease. I was at first much struck with this argument, and if the matter were res integra I should be inclined to adopt it; but an examination of the cases cited by Mr. Atherley-Jones for the defendant seems to point to a stricter interpretation of the rule, and to require that, in order to run with the land and the reversion, a covenant must directly, and not indirectly or collaterally, touch the land demised: see, for instance, *Thomas* v. *Hayward* (1); *Mayor of Congleton* v. *Pattison* (2), where Lord Ellenborough says a covenant is assignable "if it affects the nature, quality, or value of the thing demised independently of collateral circumstances or if it affects the mode of enjoyment." As to the mode of enjoyment, see *Clegg* v. *Hands* (3), relied on by Mr. Copping, on behalf of the plaintiff; see further, Cotton L.J.'s judgment (4); see also *Gower* v. *Postmaster-General.* (5)

The law on the subject seems to be fenced round with technicalities, and I do not feel at liberty to decide the case upon the ground of expediency or morality, otherwise I should, if possible, enforce the plaintiff's claim to be compensated for what seems to me a real grievance. It is to be observed, however, that the non-observance of the covenant in the underlease would not necessarily lead to a re-entry and forfeiture by the head lessor. There might not be a proviso for re-entry for breach of that particular covenant. Again, the head landlord need not act on the proviso. Also, the lessee might get relief. If the covenant was broken there would be a right to damages whether a forfeiture followed or not. Does not all this shew that the covenant to observe the covenants of the head lease does not

(1) L. R. 4 Ex. 311.
(2) 10 East, 130, at p. 135.
(3) 44 Ch. D. 503.
(4) Ibid. at p. 518.
(5) 57 L. T. 527.

1907

DEWAR v. GOODMAN

KJ.

necessarily "affect the nature, quality, or value of the thing demised independently of collateral circumstances," nor "affect the mode of enjoyment"? It may be that the Court of Appeal, if the case is carried there, may be able to take a broader view of the matter and to break through the legal technicalities which a Court of first instance feels constrained to observe. On the whole, but not without considerable doubt, I must decide that the covenant in question does not run with the land but is merely collateral. For the reasons above stated I give judgment for the defendant with costs.

Judgment accordingly.

Solicitors for plaintiff: *Harold Edwards & Cohn.*
Solicitors for defendant: *Nash, Field & Co.*

J. E. A.

Re WEBSTER. *Ex parte* THE OFFICIAL RECEIVER.

1907

Jan. 28.

Bankruptcy—Garnishee Order Nisi—Payment by Garnishee to Judgment Creditor—Bankruptcy of Judgment Debtor—Relation back of Trustee's Title to garnished Debt.

Where a debtor commits an act of bankruptcy and judgment is subsequently obtained against him by a creditor who obtains a garnishee order nisi attaching a debt due to the judgment debtor, the garnishee order nisi does not justify the garnishee in forthwith paying the debt to the judgment creditor, and if he does so the debt will still form part of the judgment debtor's estate by virtue of the relation back of the title of the trustee in bankruptcy to the act of bankruptcy. The Court will therefore, in such a case, order the garnishee, upon an application by the trustee, to pay the amount of the attached debt to the trustee.

APPEAL from the decision of the county court judge sitting at Northallerton, dismissing, with costs, an application of the trustee in bankruptcy in the following circumstances:—

On June 1, 1906, one Hammond issued a writ against Webster for 131*l.* odd. On June 7 Webster executed a deed of assignment of all his property for the benefit of his creditors. On June 9 Hammond obtained judgment for the 131*l.*, and on June 14 he obtained a garnishee order nisi attaching a debt of 62*l.* 14*s.* 2*d.*, due from Furness to Webster. The order nisi was served on Furness, the garnishee, on the same

1907

WEBSTER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

day, and he immediately paid over the 62*l.* 14*s.* 2*d.* to the judgment creditor Hammond. At this time neither the judgment creditor nor the garnishee had any notice of the deed of assignment of June 7. June 26 was the date on which the order nisi would have been made absolute, but no order absolute was ever made. On July 7 the judgment creditor presented a petition in bankruptcy against the judgment debtor for the balance of his judgment debt, the act of bankruptcy relied on being the execution of the deed of assignment of June 7, and on July 26 a receiving order was made against the judgment debtor and adjudication followed. The official receiver as trustee applied to the county court for an order on the garnishee to pay him the 62*l.* 14*s.* 2*d.* as being moneys in his hands belonging to the bankrupt. The county court judge dismissed the application.

The trustee appealed.

Hansell, for the trustee. Payment by the garnishee to the judgment creditor under an order nisi which is not made absolute is no defence as against the claim of the trustee. The order nisi attaches the money in the hands of the garnishee and keeps it in medio, and the garnishee cannot safely pay over until an order absolute is made: *Turner* v. *Jones* (1); *London Corporation* v. *London Joint Stock Bank*. (2) Here the title of the trustee related back to June 7, and the money in the hands of the garnishee was part of the bankrupt's estate, and he cannot discharge himself unless he can shew that he has paid it under an order of the Court. If a garnishee is entitled to pay the judgment creditor before the garnishee order is made absolute, the latter part of a garnishee order nisi would be unnecessary.

Compston, for the garnishee. In the circumstances it was a proper payment by the garnishee. The order nisi attached the money in his hands so that he could not pay his creditor, the judgment debtor. It would have been a contempt of Court had he done so. The voluntary payment by him to the judgment creditor without notice of the act of bankruptcy after he was served with the order nisi was a good payment by the garnishee. He paid it to the only person entitled to receive it. If the order

(1) (1857) 1 H. & N. 878. (2) (1881) 6 App. Cas. 393.

absolute had been made on June 26 he would have been perfectly safe, and under the circumstances an order absolute was not necessary: *Wood* v. *Dunn.* (1) A garnishee order nisi is within the meaning of "such proceeding" in the Rules of the Supreme Court, Order XLV., r. 7.

BIGHAM J. I am of opinion that this appeal must be allowed. But the county court judge may very well have been right in dismissing the application, as the notice of motion in the court below appears not to have been properly framed. The real point in this case is this: Does the debt of 62*l.* 14*s.* 2*d.* which at one time Furness the garnishee owed to Webster the bankrupt, form part of the bankrupt's estate?—in other words, is it still a subsisting debt due by the garnishee to the bankrupt's estate? Now, in my opinion it is quite clear upon the authorities that, in the circumstances of the present case, if the judgment debtor had not become a bankrupt and had sued the garnishee for this debt, the garnishee would have had no answer in law. He could not have said, "I have paid one of your creditors, and I seek to get the advantage of that payment." The answer would have been, "You had no authority from me to make any such payment, and you have not been compelled by any process of law to make such a payment, and, therefore, the debt due to me has not been discharged." That would have been the position if there had been no bankruptcy. What is the position now that bankruptcy of the judgment debtor has supervened? The position is simply this, that the trustee stands in the shoes of the bankrupt, with all the bankrupt's rights, one right being the right to call upon the garnishee to discharge his obligation. It is no doubt a hard case, but I see no answer to the claim made by the trustee representing the estate of the bankrupt. I think we must make the order asked for by the trustee.

PHILLIMORE J. I agree.

Appeal allowed.

Solicitors for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondent: *Miles & Hair, for Laycock & Heddon, Ripon.*

(1) (1866) L. R. 2 Q. B. 73.

J. E. A.

1907
Feb. 6.

ELSWICK STEAMSHIP COMPANY, LIMITED *v.* MONTALDI.

Ship—Charterparty—Bill of Lading incorporating Charterparty—Demurrage—Discharge at Average Rate per Day—Delay in discharging—Strike preventing or delaying Discharge.

The defendant was the charterer of the plaintiffs' ship, and the consignee of a cargo of coal shipped under bills of lading incorporating the charterparty, which provided that the charterer should discharge the ship, and that the consignee should take the cargo from alongside at an average rate of 500 tons per day and should pay demurrage if the ship was longer detained, but that in case of strikes preventing or delaying the discharge the time lost was not to count unless the ship was already on demurrage.

If the discharge had proceeded at the stipulated rate it would have been completed on January 3, 1905. On December 31, 1904, when less than half the cargo had been got out, a strike occurred among the stevedores at the port of discharge, and the discharge was not completed until January 15, 1905:—

Held that, except as to that portion of the cargo which, if the discharge had proceeded at the stipulated rate, would have remained undischarged on December 31, the defendant could not rely on the strike as an excuse for delay, since if he had not been dilatory the rest of the cargo would have been discharged before the strike began.

Semble that, except as to the portion aforesaid, the strike did not prevent or delay the discharge within the meaning of the charterparty.

Trial of action before Bigham J. without a jury.

The action was for demurrage. The plaintiffs were the owners of the steamship *Elswick Tower*. The defendant was the owner of 4864 tons of coal shipped by him on the plaintiffs' said steamship for carriage to Venice, consigned to his order under bills of lading dated in Newcastle on November 21, 1904, incorporating the terms of a charterparty of the like date made between the plaintiffs and the defendant.

Clause 8 of the charterparty was as follows: "The cargo to be taken from alongside by consignees at port of discharge free of expense and risk to the steamer, at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of four pence per net registered ton per running day (or pro rata part

thereof). Time to commence when steamer is ready to unload and written notice given, whether in berth or not. In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count, unless the steamer is already on demurrage. Charterers to effect the discharge of the cargo, steamer paying ten pence per ton of twenty hundredweights or 1015 kilos for coals and usual cost for coke and goods and providing only steam, steam-winches, winchmen, gins, and falls."

The ship arrived at Venice on December 21, 1904; she was ready to discharge, and written notice of that fact was given by 2 o'clock P.M. on that day, and the lay days began to run from that hour. She had on board, together with 166 tons of other cargo, the 4864 tons of coal belonging to the defendant. At the average rate of discharge specified in the charterparty the whole cargo ought to have been discharged under ordinary circumstances by January 3, 1905, at about mid-day; but by Saturday, December 31, 1904, owing to circumstances which the defendant did not plead as an excuse, only 2335 tons had been discharged, and 2695 tons were still on board.

On that day a strike occurred among the stevedores at the port of discharge. The defendant proceeded with the discharge notwithstanding the strike, which continued until the discharge was completed on January 15, 1905.

The plaintiffs claimed 385*l.* 10*s.*, being nine days' demurrage at 42*l.* 16*s.* 8*d.* per day.

J. A. Hamilton, K.C., and *Lewis Noad*, for the plaintiffs. The defendant was so dilatory in discharging this ship that he could not have completed it by January 3, even if there had been no strike. The strike did not, therefore, prevent or delay the discharging within the meaning of clause 8 of the charterparty. What really prevented and delayed the discharge was the defendant's own default, and not the strike. Therefore the plaintiffs are entitled to some demurrage, and the only question is how much. The ship ought to have been discharged on Tuesday, January 3; she was not in fact discharged until

1907

ELSWICK STEAMSHIP COMPANY, LIMITED v. MONTALDI.

Sunday, January 15—that is, twelve days beyond the lay days specified in the charterparty. If the defendant had been punctual in discharging the ship at the rate of 500 tons per working day, as provided by the charterparty, there would still have remained a small portion of cargo undischarged on December 31. Allowing three days for delay caused by the strike in getting out this portion, the plaintiffs are entitled to nine days' demurrage.

W. Wills, for the defendant. The defendant was not bound to discharge the ship of 500 tons per day, but only to discharge her at the average rate of 500 tons per day. It could not be said that he was in default until January 3 had passed. But for the strike he might have completed the discharge on or before that date. On December 31, before any default on his part, the strike occurred and delayed the discharge until January 15. By clause 8 of the charterparty, in case of strikes which prevent or delay the discharging, the time lost is not to count in the lay days. As the strike occurred before default on the part of the defendant, it follows that the strike, and not the defendant's default, was what prevented or delayed the discharge. Therefore the defendant is excused.

BIGHAM J., after stating the facts, gave judgment as follows:—In the ten days between December 21 and December 31 2335 tons, that is to say, less than half the coal, had been delivered; and the position in point of fact was that the defendant had so conducted himself in connection with the discharge of this vessel that he had made it physically impossible for him to perform his contract. It was quite out of the question that he should be able to discharge the balance of 2695 tons by January 3. The result of his conduct was that the discharge of these 2695 tons was thrown into the strike period. In these circumstances the defendant cannot rely on the strike as an excuse, except as regards that portion of the cargo which would have remained undischarged on December 31 if up to that date he had been discharging at the rate of 500 tons per working day; to the extent to which the strike delayed the discharge of that portion he may claim to be excused, but not further. Taking this delay into account, I have come to the conclusion that, if he

had not put himself in a position making it impossible for him to discharge the ship within the lay days, he would have been able to complete the discharge by January 4 or thereabouts. The real reason why he was not able to do this was that he had by his own dilatoriness rendered it impossible to complete the discharge within the lay days. Therefore, in my opinion, he cannot rely on the strike as an excuse except for the delay in discharging the small portion of cargo which would still have remained in the ship when the strike commenced, even though the discharge had been conducted at the proper rate.

As to the number of days demurrage, I think the justice of the case will be met by allowing the plaintiffs seven days at the amount claimed; that is to say, there will be judgment for the plaintiffs for 299*l.* 16*s.* 8*d.*

Judgment for the plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Co., for Bramwell & Bell, Newcastle-upon-Tyne.*

Solicitors for defendant: *Stibbard, Gibson & Co., for Daggett & Grey, Newcastle-upon-Tyne.*

W. H. G.

C. A.
1907
Jan. 17, 18.

[IN THE COURT OF APPEAL.]

DAVIES, Appellant *v.* SEISDON UNION, Respondents.

Poor Rate—Assessment—Sewage Farm.

A sewerage board, being under a statutory obligation to dispose of the sewage of a district, acquired for the purpose a farm, on which they laid pipes and constructed channels for the distribution of the sewage. This farm they let to a tenant as a sewage farm. The rent reserved by the lease was a fair rent for the farm as agricultural land, including the manurial value of the sewage :—

Held that, in assessing the value of the farm, the rating authority were bound to take into consideration the benefit accruing to the sewerage board from the farm as a means of enabling them to discharge their statutory duties.

Decision of Divisional Court, [1906] 1 K. B. 214, reversed.

Appeal from a decision of the Divisional Court upon a case stated by the quarter sessions of the county of Stafford (1).

Upon the hearing by the quarter sessions of an appeal against a poor rate made on May 2, 1904, whereby the appellant was rated in respect of certain hereditaments in the occupation of the appellant in the parish of Kinver, in the Seisdon Union, known as the Whittington Hall Farm, and consisting of land, houses, buildings, sewerage works and plant, the gross estimated rental being assessed at 788*l.*, the rateable value of the agricultural land at 336*l.* 15*s.*, and the rateable value of the buildings and other hereditaments, not being agricultural land, at 337*l.*, it was ordered that the gross estimated rental of the farm should be assessed at 479*l.*, the rateable value of the agricultural land at 380*l.*, and the rateable value of the buildings and other hereditaments, not being agricultural land, at 46*l.* subject to the following case for the opinion of the Court.

"1. The Whittington Hall Farm and the houses, buildings, and sewerage works thereon (except a small portion of land in the parish of Wolverley, rated at a gross estimated rental of 3*l.* and a rateable value of 2*l.* 15*s.*) are situated in the parish of Kinver, and belong to the Upper Stour Valley Main Sewerage Board, which is a sewerage board duly constituted by statute for

(1) [1906] 1 K. B. 214.

the purpose of dealing with the sewage from the following districts or places, viz.: The Netherton and Woodside wards of the borough of Dudley, the Rowley Regis, Lye and Wollescote, and Quarry Bank urban districts, and certain parishes in the Halesowen rural district, all of which are situated outside the said parish of Kinver and the said Seisdon Union, and are hereinafter collectively referred to as 'the said district.' The said district is defined by a provisional order, which was confirmed by the Local Government Board Provisional Orders Confirmation (No. 7) Act, 1892, and the Upper Stour Valley Main Sewerage Board is hereinafter referred to as 'the sewerage board.'

"2. For the purpose of carrying out the duties imposed upon them, the said sewerage board acquired the said Whittington Hall Farm mentioned in the said rate, which farm is let in the manner hereinafter mentioned to the appellant Edward Davies.

"3. After the said farm was so acquired it was converted by the said sewerage board into a sewage farm for the purpose of dealing with the sewage of the said district, and for this purpose the said sewerage board laid down and constructed upon the said farm carriers, distributors, catchpits and sluices, consisting of brick or pipe channels and appliances (hereinafter called 'the said plant'). The said plant was constructed under and upon the surface of the said farm for carrying the sewage from the mains of the said sewerage board to suitable places and disposing thereof on the said farm. The sewage brought to the said farm by the said sewerage board is distributed upon the said farm by means of the said plant, and is there dealt with by the system known as the broad irrigation system.

"4. The sewerage board have spent in laying down and equipping the said plant, and in making roads on the said farm, in addition to the cost of the said farm, the sum of 8962*l.* or thereabouts. The sewerage board were able to borrow the said money at a rate of $3\frac{1}{4}$ per cent. per annum.

"5. The said Whittington Hall Farm contains about 433 acres 3 roods 17 perches or thereabouts in the parish of Kinver, and 1 acre 3 roods in the parish of Wolverley, and has been let to the appellant by the said sewerage board and the

C. A. 1907

DAVIES v. SEISDON UNION.

former owners thereof for many years. By a lease dated March 16, 1893, the rent was fixed at 460*l.* per annum. By an agreement dated February 27, 1904, the said rent was in March, 1904, increased to the sum of 490*l.* per annum, and subject to this variation in the rent the tenancy was, and still is, continued upon the terms of the said lease so far as the same are applicable to a tenancy from year to year. Copies of the lease and agreement form part of this case.

"6. The said sewerage board are duly rated in respect of the whole of their premises, mains, and works (used in dealing with their sewage) other than the said plant upon the said farm.

"7. The said sewerage board were at one time rated in respect of the said plant, but upon appeal to quarter sessions the rate was amended on the ground that the said sewerage board were not in occupation of the said plant, but that the said plant was in occupation of the tenant of the said farm.

"8. In a subsequent rate the appellant, as tenant of the said farm, was rated separately for the said plant, under the heading 'Sewage Works and Plant,' in the sums of 364*l.* gross estimated rental and 291*l.* 5*s.* rateable value as for 'Buildings and other Hereditaments not being Agricultural Land.' But on an appeal to quarter sessions, which was by consent referred to Mr. A. T. Lawrence, K.C., as arbitrator, the said rate was ordered to be amended by striking out the assessment.

"9. The sewerage board during the tenancy of the appellant continue to discharge their sewage by means of the said plant on to the said farm, and thereby are enabled to perform their statutory duties. The rent payable by the appellant under the said lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the said lease, including the value of the sewage. The said rent is more than it would be if the appellant did not get the manurial value of the said sewage.

"10. It was contended by the appellant that the hereditament must be assessed as it stands in the hands of the appellant, and that the rate must be made upon the basis of the rent which a tenant might reasonably be expected to give for the farm as a sewage farm, and that the best evidence of such rent was the actual rent which the appellant paid under the said

lease, and that the respondents ought not to include in the said assessment (as they have done) any sum which represented the annual value of the advantages accruing to the said sewerage board (over and above the rent of the said farm) in respect of the facilities afforded to them by the user of the said farm as a sewage farm for the performance of their statutory duties.

"11. The respondents, on the other hand, contended that to assess the appellant on the basis of the actual money paid under the said lease was to treat the farm merely as an agricultural holding, and to leave out of account the fact that under the terms of the said lease the appellant is bound to so use the said farm, and by and upon it to give such facilities to the sewerage board as to enable them to carry out their statutory duties, for which facilities they would be willing to pay; that the farm in the hands of the sewerage board would be equal in value to the money paid by the appellant plus the annual value of such facilities, and that in the hands of the tenant the value of the obligations imposed by the said lease upon the tenant (which would equal the value of the said facilities) must be added to the actual money paid by the appellant for the purpose of arriving at the rateable value of the said farm.

"12. The sessions held that the actual sum paid by the appellant was the true basis upon which the said hereditaments should be rated, and that they ought not to take into account the annual value of the advantages and facilities accruing to the sewerage board in connection with the said plant, and they reduced the rate accordingly.

"The question for the opinion of the Court is whether the sessions ought to have taken into consideration, beyond the sum payable by the appellant as agricultural tenant under the said lease, the fact that the said farm affords a means of disposing of the sewage of the said sewerage board, and thereby enables them to fulfil their statutory duties in that behalf.

"If the Court should answer the said question in the affirmative, the said order is to be quashed, and the Court shall make such order herein as the Court shall think fit; but if the Court should answer the said question in the negative, the said order is to be affirmed."

C. A. 1907

DAVIES v. SEISDON UNION.

The lease of March 16, 1893, contained covenants by the lessee that he would at all times during the term, to the satisfaction of the board's surveyor, irrigate and manure the lands with and utilize all such sewage and sewage water as might be during his tenancy delivered thereon by the said board, so that the same sewage and sewage water might be freed from all excrementitious or other foul or noxious matter and clarified and purified and kept inodorous by application to the said land in such a manner that it might properly be discharged by the lessee into any stream without breach of the law; that he would receive and distribute on the lands all the sewage and sewage water which might be delivered thereon by the board, and would use and dispose of the same in manner thereinbefore provided, and also would, at his own cost and charges, take charge of and keep cleaned and free from refuse certain carriers, sluices, and other plant therein specified, and would not commit or allow to be committed any nuisance on the premises, and would keep the board indemnified against all actions on account of nuisance.

The Divisional Court affirmed the order of the quarter sessions.

The assessment committee appealed.

Alexander Glen, K.C., and *Disturnal*, for the assessment committee. The decision of the Divisional Court is erroneous, because it omits the element of value which arises from the capacity of the premises for the disposal of sewage. A sewage farm is partly an artificial hereditament owing to the construction of sewage works, and its primary object is not the growing of crops, but the disposal of sewage. The tenant farmer bases the rent which he can afford to pay on the net profits of the working of the farm, but if that were the only consideration to be taken into account in ascertaining the rateable value of the premises, it would follow that, if the farm were worked at a loss, the premises would be valueless. That would be an absurd result. The true test is what rent would a hypothetical tenant be willing to pay for the premises; and among the possible hypothetical tenants the landlord is to be included. Therefore the question in this case is what would the sewerage board pay for the annual occupation of these premises: *Burton-on-Trent*

Corporation v. *Burton-on-Trent Union* (1); *London County Council* v. *Erith Overseers.* (2) The judgment of the Court below assumes, rightly, that the board might be possible tenants, but yet it is based on the remunerative value to the actual tenant. The Court has confused the rateable value of the property with the remunerative value to the particular occupier, and has omitted to take into account the benefit which the landlord gets out of the land. This is opposed to *Reg.* v. *Rhymney Ry. Co.* (3) There wharves were let to a railway company, who were the sole occupiers, but by the agreement certain wharfage dues were reserved to the landlords. It was held that the company were liable to be assessed in respect of the full rateable value notwithstanding that they did not get the full benefit from their occupation. Here the real consideration which the sewerage board are getting is the money rent plus the ensuring of the performance of their statutory duties, and if they were tenants they would expect to pay, first the annual value of the land as agricultural land, and secondly the annual value of the sewage works; and in a case like this, where no profits are earned by the hereditaments, the only practicable mode of arriving at the rateable value is by taking a percentage on the cost of construction: *Liverpool Corporation* v. *Llanfyllin Assessment Committee.* (4) In addition to the amount of rent paid by the tenant based on net profits, there is a further element to be taken into account based on the advantage to the sewerage board from the land being occupied under covenants by which the tenant undertakes the disposal of the sewage. In such a case the burden of the covenants is really part of the rent which the tenant is paying, and the actual rent cannot be the true basis of the value. This is analogous to the cases of tied houses, where the actual money rent payable by the publican is often merely nominal: *Sunderland Overseers* v. *Sunderland Union* (5); *Walker* v. *Brisley.* (6) The quarter sessions, in basing the assessment on the actual rent, proceeded upon a wrong basis, and this matter ought to be remitted to them.

(1) (1889) 24 Q. B. D. 197.
(2) [1893] A. C. 562, 588.
(3) (1869) L. R. 4 Q. B. 276.
(4) [1899] 2 Q. B. 14, 20.
(5) (1865) 34 L. J. (M.C.) 121, 136.
(6) [1900] 2 Q. B. 735.

C. A. 1907

DAVIES v. SEISDON UNION.

Ryde and *H. R. Ward*, for the appellant. In this assessment the manurial value of the sewage is taken into account, and the rent is thereby increased; therefore the delivery of the sewage on to the land is a benefit, and not a burden, to the tenant. The measure of value fixed by the Parochial Assessments Act, 1836, is the rent which the occupier would pay to an imaginary landlord. Any benefit accruing to the landlord outside rent is disregarded. *Reg.* v. *Rhymney Ry. Co.* (1) is distinguishable, because the covenant in that case cut down the value which the actual tenant received below the value which the hypothetical occupier would get. Here the covenant increases the value to the actual tenant. A mere demise would not have given him the sewage, and the manurial value of the sewage is a valuable asset, and the rent is increased accordingly. No doubt this calculation leaves out of account the benefit accruing to the landlord, but so does the statute. The cases on tied houses really support this view. The rent is reduced because of the covenant to take beer from the landlord at the landlord's price, and the publican is paying rent partly in the extra price which he is charged for the beer, but in this case the covenant is beneficial to the tenant. The principle of the cases is that you cannot exclude the actual occupier merely because he happens to be the owner, but it is said that you must include the owner even though he is not the occupier.

[BUCKLEY L.J. In *London County Council* v. *Erith Overseers* (2) Lord Herschell considered it immaterial whether the owner was in occupation or not.]

In that case, and in other cases of the same class where the owner has been treated as a hypothetical tenant, the owner was in fact bound to be in occupation. But here, although the board are bound to have a farm for the disposal of their sewage, they are not bound to occupy it. If you find the user of the sewage and the covenant to use it beneficial to the tenant, then you cannot add anything to the rateable value on account of the additional benefit accruing to the landlord, although if the covenant were burdensome something might be added, because the burden of the covenant would really represent part of the rent. The question is not what is the benefit to the landlord,

(1) L. R. 4 Q. B. 276. (2) [1893] A. C. 562, 588.

but what is the burden to the tenant: in other words, what sum would the tenant pay to get rid of the covenant? The only advantage to the landlord to be taken into consideration is something by which the tenant is the poorer. Further, interest on the cost of construction in a case of this kind cannot be treated as the test of rateable value. In some cases, where the premises are occupied by the owner, it may be a rough test; but where the premises are occupied by a tenant it is not a good test at all, because the rent which he actually pays is a far better one: *Reg.* v. *London School Board.* (1)

SIR GORELL BARNES, P., after stating the facts, continued as follows:—The substantial point which I understand these facts to raise, and which is intended to be submitted for the decision of the Court, is whether or not the rating is to be based upon the exclusion of all consideration of the position of the sewerage board as a hypothetical tenant. The basis, of course, of the law applicable to the case is to be found first in the statute of Elizabeth (43 Eliz. c. 2), which fixed the liability of the occupier, and then in the Parochial Assessments Act of 1836, s. 1, which provided for the assessment of the liability. That section says that "no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The provisions of those Acts, and especially of the last section, have been frequently the subject of consideration in the Courts, and a number of cases have been cited to us which bear more or less upon the present question, but it seems to me that the points which we have to consider are really covered very clearly by two or three of those authorities to which I desire shortly to refer. One is the case of *Reg.* v. *School Board*

(1) (1885) 55 L. J. (M.C.) 33, 38; (1886) 17 Q. B. D. 738.

C. A. 1907

DAVIES v. SEISDON UNION.

The President.

for London. (1) The head-note sufficiently states the point for my purpose. It is as follows: "In assessing to the poor rate schools occupied by a school board, which can make no profit in a commercial sense as tenant of the schools, the school board itself ought to be considered as a possible tenant, and the gross and rateable values calculated by the rent which the board might reasonably be expected to pay for the premises for use as schools"; and, to express the nature of that decision perhaps a little more fully, I desire to refer to the judgment of the late Lord Bowen. He says: "I am satisfied that the real, and, indeed, the only, question for decision is whether the school board is to be excluded from the list of possible hypothetical yearly tenants. To decide this it is necessary to refer to the Act of Parliament, and on doing so it seems to me that there is no more mystery." Then he refers to 6 & 7 Will. 4, c. 96, s. 1, and 32 & 33 Vict. c. 67, s. 4, and says: "The rate is to be made upon an estimate of the rent at which the premises might reasonably be expected to let from year to year; that must mean to let to someone who wants to hire them. The question is whether the school board is to be excluded from the list of possible occupiers. If the inquiry is made whether it might reasonably be expected that the premises would be let to the school board, the answer must be in the affirmative. That being so, it seems impossible to exclude the school board. Therefore the language of the Act answers the question. The case cannot fairly be decided on the hypothesis that the one person who wants the premises most would not take them. It does not matter whether the school board wants the premises for the purpose of profit, or will make profit out of them: the question is whether the school board wants and would take them. I am satisfied that the principle on which the value has been estimated is sound." The other judgments are to the same effect.

Before referring to the next case I desire to notice the point which was taken by Mr. Ryde, that that decision is only dealing with the case where the occupier and owner are the same person, and he contends that that differentiates that case from that which is now before the Court. In answer to that observation, I

(1) 17 Q. B. D. 738.

think that the very elaborate and lucid judgment which was delivered by Lord Herschell in *London County Council* v. *Churchwardens and Overseers of Erith* (1) may well be referred to. He says this: "It has never been doubted that the rent which is actually being paid by the occupier does not necessarily indicate what is the rent which a tenant might reasonably be expected to pay, or that an owner who is in occupation, and who may not be willing to let on any terms, is none the less rateable. The tenant described by the statute has always been spoken of by the Court as 'the hypothetical tenant.' Whether the premises are in the occupation of the owner or not, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them? So far there can, I think, be no difference of opinion. But then arises the question: Is the owner to be regarded as one of the possible tenants in considering what rent might reasonably be expected? Bearing in mind what was the object of the Legislature in prescribing this test of annual value, I cannot myself entertain any doubt that the owner ought to be thus taken into account. I entirely concur in the decision arrived at by the Court of Appeal in the case of *Reg.* v. *School Board for London*. (2) I think the circumstances of that case when examined are cogent to support the view which there obtained acceptance. If the school board were to hire buildings for the purpose of establishing a school, it could not be contested that these buildings would be rateable, and that the rent which the school board paid would be a most important element in determining the sum at which they were to be assessed. If instead of hiring buildings they erected, upon land similarly situate, like buildings, or if they were to buy the reversion of the buildings they hired, and so became the owners, why, in either of these cases should the assessment be different? The premises are to them in all these cases of the same value, and their occupation is equally beneficial; why should the sum at which they are to be assessed to the relief of the poor differ?"

Now, as I read the judgment of Lord Alverstone C.J. in the Divisional Court, I do not find that there is any part of it which

(1) [1893] A. C. 562, at p. 588. (2) 17 Q. B. D. 738.

C. A. 1907

DAVIES v. SEISDON UNION.

The President.

is in disagreement with the principles of those two cases to which I have referred and the other cases which have been cited, for the Lord Chief Justice says (1): "It is agreed that the rateable hereditament in the occupation of the tenant is not a pumping station nor a rising main, nor anything of that sort, but consists of carriers which carry the sewage about his fields, and through which he distributes it. Then what is the value to the hypothetical tenant, not this particular tenant who is in occupation, but the hypothetical tenant, of the right of enjoying the receipt of sewage through those carriers? I agree with Mr. Glen that among the possible hypothetical tenants is to be included the sewerage board, who might wish to make use of this particular opportunity of getting rid of their sewage." So that the principles to which I have referred met with the acceptance of the Court below, but it is in the application of those principles that in my view, with the greatest respect for the decision of the Lord Chief Justice, an error seems to have crept in. Where that error seems to have crept in is to be seen in the following passage. He says there (2): "It is not suggested that the tenant gets anything from the board for so permitting them to discharge their statutory duties." Then, reading from the case, he says: "'The rent payable by the appellant under the said lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the said lease, including the value of the said sewage. The said rent is more than it would be if the appellant did not get the manurial value of the said sewage.'" That is where the passage in the case closes. Then he proceeds: "I understand that to mean that, taking the rent of the agricultural land as x, 490*l.* represents x plus the sum which the hypothetical tenant would pay for getting the sewage through the carriers." It seems to me that the words there, "the hypothetical tenant," are not applicable to the point which was raised, but the words "the particular tenant in this case" are really the words which are applicable, because there can be no doubt that the sessions have excluded from consideration the position which it seems to me, according to the principle which I have referred to, should be considered, namely, what would be the rent reasonably to be

(1) [1906] 1 K. B. 214, 219. (2) [1906] 1 K. B. 220.

expected to be obtained from the premises having regard to the fact that there is another person, namely, the owner of the premises, who might become a tenant of them, if he so desires. The Lord Chief Justice further proceeds on that basis, and decides in favour of the rate as it had been found by the quarter sessions, and the appeal was dismissed. It is from that decision that the appeal is brought to this Court in order to obtain an expression of opinion that the rate should take into consideration the fact that the sewerage board may be treated as hypothetical tenants and may be considered in estimating the amount at which the rate should be fixed. It seems to me clear, upon the statement of the case and from what we have heard from counsel, that that has been at present excluded. The contention on the one side is that it has been wrongly excluded, and on the other side that it is rightly excluded, as I understand, or in one view, that some consideration has been given to it. In the first place, I cannot regard the statement of the case as shewing that any effect has been given to that at all, because paragraph 9 contains this passage: "The rent payable by the appellant under the said lease was fixed after negotiation, and is a fair rent for the advantages which the appellant gets under the said lease including the value of the sewage. The said rent is more than it would be if the appellant did not get the manurial value of the sewage." The rent is no doubt larger than would have been the case if the tenant had not got the benefit of the manurial value which the deposit of the sewage on the land would give to him, but that does not take into account, and the rate does not take into account, what might have been reasonably expected to be got if the sewerage board had been treated as one of the hypothetical tenants. That that consideration may be of importance is obvious from the position in which this matter is found. Here is a farm the tenant of which pays so much rent based upon the fair agricultural value plus some benefit which he gets from an improvement produced by the deposit of the sewage, but there is no doubt that the quarter sessions have eliminated the fact that, in order to obtain that improvement, there has been spent a sum of 8962*l.*, or thereabouts, by the sewerage board. If they were the persons who were compelled to take

C. A. 1907

DAVIES v. SEISDON UNION.

The President

such land as this, and to pay a proper rent for it, they would be out of pocket in addition to their rent the amount which they have provided for the purpose of laying down the sewage system, and they would have to pay, in order to obtain such a place as this if they had to get it as a farm, with all this plant upon it, for the money spent upon it to make that plant. It seems to me that they would have to pay more than they would have to pay for the rent of a farm which was nothing more than an agricultural farm, even though they got some benefit from the manure upon it. That is the point which is left out of consideration if once you regard the board as capable of being hypothetical tenants. Without going into any figures in this case, it seems to me that that point must be considered, and that the question stated for the opinion of the Court must be answered in such a way as to allow of that point being considered by the rating authority. For these reasons in my opinion this appeal ought to be allowed.

FARWELL L.J. I agree. It is well settled that the question to be answered is what would the hypothetical tenant give, treating him as a tenant from year to year under the qualifications mentioned in the Act of 1836. It is also well settled that, if the property is let to a tenant, the rent paid by that tenant is only an element of evidence; it is by no means conclusive. It is also well settled that, whether the property be vacant or not, the owner is to be regarded as a possible occupier for the purpose of rating. In considering that last proposition we must have regard to the fact that the owner may be under a statutory obligation to take the land in question and use it for the purpose of discharging his statutory duties. The farm in this case is one which at considerable expense has been prepared for getting rid of the sewage of the town or district. The agricultural tenant finds it worth his while to give a certain rent for it, as a fair rent fixed after negotiation upon the basis of the advantages which he gets under the lease, including the value of the sewage, which in this case is advantageous to him, from the tenant's point of view; and the justices ought to have considered the sanitary authority as a hypothetical competitor with the actual tenant for the hypothetical tenancy for the purpose

of rating. That being so, it is for them to consider whether it would or would not be worth while for the owner, treating him as the hypothetical tenant, to give more than the tenant who is simply an agricultural tenant; and it would not be right to leave out of consideration the fact that all those duties which are cast upon the sanitary authority can be performed by them on this particular farm by virtue of the expenditure of money upon it in a way which concerns them and does not concern the agricultural tenant. The concluding words of Lord Herschell read by the President apply mutatis mutandis to the present case, reading "sanitary authority" for "school board": "If the sanitary authority were to hire buildings for the purpose of establishing a sewerage system, it could not be contested that these lands and buildings would be rateable, and that the rent which the sanitary authority paid would be a most important element in determining the sum at which they were to be assessed. If, instead of hiring lands and buildings, they erected, upon land similarly situate, like sewage buildings, or if they were to buy the reversion of the lands and buildings they hired, and so became the owners, why in either of these cases should the assessment be different?" That is an element which appears to me to have been left out of consideration altogether in the present case, as is apparent from the form of question put by the Lord Chief Justice (1): "What is the value to the hypothetical tenant, not this particular tenant who is in occupation, but the hypothetical tenant, of the right of enjoying the receipt of sewage through those carriers?" But that is not the whole question. There is also to be considered what would be the value to the hypothetical tenant, including in that term the sanitary authority, not merely of the right of receiving, but also of the opportunity and means of getting rid of, the sewage which they have to dispose of. Test it in this way. Supposing the tenant was willing to take the land and dispose of the sewage for the sanitary authority without paying any rent at all, the Lord Chief Justice's question would be answered by saying that the value of the right of enjoying the receipt of the sewage is nil; but it is obvious

(1) [1906] 1 K. B. 219.

C. A. 1907

DAVIES v. SEISDON UNION.

Farwell L.J.

the rateable value would not be nil, because the advantage accruing to the sanitary authority must be taken into account, and the considerations pointed out by Lord Herschell, in order to ascertain what the sanitary authority, treating them as hypothetical bidders for a tenancy, would be prepared to give. If the justices had turned their attention to the statement of the case in *Mayor, &c., of Burton-upon-Trent* v. *Burton-upon-Trent Union* (1) in paragraphs 7, 8, and 9, they would have found a basis on which they might very well have framed their answers in the present case. It does not, however, follow that, because the board have spent nearly 9000*l.* in these carriers and works, a percentage on that sum is any fair criterion; in the *Erith Case* (2) Lord Herschell says: "In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises." That is a question which to my mind ought to be answered, but the justices have told us in terms that they excluded the consideration of the sanitary authority as a possible hypothetical tenant and have regarded only the value to the agricultural tenant. I think, with all respect to the Divisional Court, that they were wrong.

BUCKLEY L.J. The question in this case is in my judgment covered by authority to be found in decisions of this Court and of the House of Lords. The question is what is the true principle of assessment of a sewage farm which belongs to a sewerage board and is by them demised to a tenant. The terms of the lease are that the tenant pays a certain rent and is bound by covenants the short effect of which is that he will so deal with the sewage as to remove all excrementitious matter and deodorize and purify it. In questions of rating the principle which is to be followed is, I think, plain. I read it from Lord Herschell's words in the *Erith Case* (3), where he says:

(1) 24 Q. B. D. 197. (2) [1893] A. C. 562, at p. 593.
(3) Ibid. at p. 588.

"Whether the premises are in the occupation of the owner or not, the question to be answered is: Supposing they were vacant and to let, what rent might reasonably be expected to be obtained for them?" The question, as was stated in *Reg.* v. *Rhymney Ry. Co.* (1), is not what is the remunerative value of the premises to the occupier, but what is the rateable value of the premises upon that footing? Lord Esher, in the *Burton Case* (2) says: "The question under the statute is not whether a tenant could occupy at a profit, but whether a tenant could be found willing to pay a rent." The rateable value and the value to the occupier may be the same; but if they are not, the rent which the hypothetical tenant would give, and not the rent which the tenant in occupation is giving, is the true measure. At the same time, the actual rent is of course valuable in assisting the Court to determine what is the fair value of the premises within s. 1 of the Parochial Assessments Act, 1836. I will in the first place apply to this case the test of the actual rent paid. What is the rent which this tenant is paying? He is not merely paying the pecuniary rent. His obligations towards the landlord are that he will pay his landlord a certain rent, and that he will perform for the benefit of his landlord a certain covenant—a covenant to deal with the sewage so that it shall become inodorous. The latter obligation cannot be disregarded. It is a factor which may result in a pecuniary sum, or may not. But the fact is that his obligations to his landlord are to pay him the rent and to discharge a liability under which the sanitary authority lies in respect of dealing with the sewage. If the premises are capable of producing two benefits, of which the one is taken by the lessee and the other by the lessor, it was decided in the *Rhymney Case* (1) that the tenant who, of course, as occupier is rateable in respect of the premises, is to be assessed not merely upon that benefit or profit or annual value of the premises which he receives as tenant, but upon the aggregate value of the annual benefit which the lessor and the tenant receive, and for this reason, that if those premises were vacant and to let, and you

(1) L. R. 4 Q. B. 276. (2) 24 Q. B. D. 197, at p. 210.

C. A. 1907

DAVIES v. SEISDON UNION.

Buckley L.J.

sought for the hypothetical tenant, you would find in that state of facts that the hypothetical tenant would be prepared to pay a rent measured by the two benefits, that enjoyed by the tenant and that enjoyed by the lessor. That was decided in the *Rhymney Case*, which followed the *Mersey Docks Cases* in the House of Lords. (1) So far I have dealt with the matter on the basis of the rent paid by the tenant. That, however, is a test which is not an exhaustive way of measuring the assessment. The proper measure is, as stated by Lord Herschell, Assume the premises to be vacant, what would a hypothetical tenant give? Then comes this principle, that in seeking your hypothetical tenant, as decided in *Reg.* v. *School Board for London* (2), and again in the case of *Mayor, &c., of Burton-on-Trent* v. *Burton-on-Trent Union Assessment Committee* (3), both of which cases were approved in the House of Lords in the *Erith Case* (4), you are to regard the owner of the land as being amongst the class of possible tenants. I was surprised to hear from Mr. Ryde an argument that those cases do not apply where the owner is not in occupation. That argument appears to me to be directly in the teeth of the language of Lord Herschell in the House of Lords, which I have already read, where he says (5), "whether the premises are in the occupation of the owner or not the question to be answered is," and so on. It seems to me quite plain from the decision of the House of Lords that, although the owner is not in occupation, he is to be regarded as amongst the class of hypothetical tenants. Here we have a board which owes a statutory duty. That is a case which has arisen in two instances, the *School Board for London Case* (2) and the *Burton Case*. (3) A public body owes a statutory duty, and for the performance of that duty it is necessary for it to own land. To ascertain the rateable value of the premises you must estimate as best you can what rent the hypothetical tenant would pay, including in the class of hypothetical tenants the owner of the land.

Let me suppose that the sewerage board in this case wanted premises for the disposal of their sewage. Let me suppose that

(1) (1865) 11 H. L. C. 443.
(2) 17 Q. B. D. 738.
(3) 24 Q. B. D. 197.
(4) [1893] A. C. 562.
(5) Ibid. at p. 588.

the sanitary authority of an adjoining parish had already laid out a sewage farm, that they had put up the plant and that the whole thing was ready, but that they did not want it themselves because they had established another system, and that the sewage farm which they had laid out was to let, what rent would they look to get, and what rent would the other sewerage board be willing to pay, under those circumstances? Would it or would it not be measured, amongst other things, by this, that the authority, wanting to let, had expended 10,000*l.* on the plant? I answer, "Certainly, yes." They would say, "It cost us 10,000*l.* to put up the plant; we want a proper return upon that, say 3 per cent. Then there is the value of the land as agricultural land. That is so much, and the rent we shall ask will be measured by the aggregate of those things." Would the sewerage board, who are minded to take, pay that rent? Obviously they would if the figures were reasonable, because their alternative would be to take other land and spend the 10,000*l.* themselves with the result of producing the same pecuniary result. Then that hypothetical tenant would pay, I apprehend, a rent measured by, amongst other things, the cost of putting up the plant.

It has been pressed upon us that paragraph 9 of the case states that the rent which the tenant is paying is more than it would be if he did not get the manurial value of the sewage. I am not sure that that means after taking into account the annual incidence of the performance of the covenants, but I will assume that it does. Let me suppose the facts to be that the farm, if it did not get the sewage, would be worth 400*l.* a year, but that as manured with the sewage it is worth 490*l.* a year, and that the plant is so good and so inexpensive to work that it only costs 5*l.* a year to work. Of course, the cost of the covenant is trifling there, while the rent is increased by a large figure. Under those circumstances would it be right to disregard the fact that the plant had cost 10,000*l.*? I think not. The question is not what is the actual cost of working the plant, but what is the annual incidence of the charge which is incurred by reason of the fact that capital has been sunk in erecting the plant, and to that, of course, must be added the annual charge for working

C. A. 1907

DAVIES v. SEISDON UNION.

Buckley L.J.

the plant. It seems to me that necessarily you must take into account in proper form, whatever that may be, the fact that that plant was erected at a certain cost. For these reasons it seems to me that the quarter sessions went wrong in the principle upon which they assessed these premises. I take it from paragraph 12 of the case, "We held that the actual sum paid by the appellant" —that is to say, by the tenant—"was the true basis upon which the said hereditament should be rated." That statement proceeded on the rent only. I do not wish to press that too much; the relevant passage is what follows, "and that we ought not to take into account the annual value of the advantages and facilities accruing to the sewerage board in connection with the said plant, and we reduced the said rate accordingly." They have disregarded as a factor the annual value which the sewerage board obtain by the advantage of the tenant utilizing their plant so as to render their sewage inodorous, a statutory duty which they have to perform. In my opinion they ought to have taken that into account. For these reasons it seems to me that the order ought to be quashed, and the matter ought to go back for a fresh assessment upon the principles laid down by this Court.

Appeal allowed.

Solicitors: *J. Mitchell, for H. Taylor, Wolverhampton; Dennison, Horne & Co., for George Green, Cradley Heath.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1907
Jan. 23, 24.

BIDDLE *v.* HART.

Employer and Workman—Injury—Compensation—Defective Plant—Stevedore —Unloading Ship—Defect in Ship's Tackle—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.

A stevedore's workman while engaged in unloading a ship was injured by the fall of a bale of cargo. Part of the tackle used for the unloading was supplied by the ship, and the accident was caused by a defect in this part of the tackle. The workman having brought an action in the county court against the stevedore for compensation under the Employers' Liability Act, 1880, the judge withdrew the case from the jury on the ground that the stevedore was not responsible for a defect in the ship's tackle, and his decision was affirmed by the Divisional Court:—

Held, that the stevedore owed a duty to the workman to take reasonable care in seeing that this tackle was in a proper condition, and that the action must be sent back for a new trial.

APPEAL from a decision of the Divisional Court, affirming by a majority the decision of the judge of the county court at Southwark.

The action was brought under the Employers' Liability Act, 1880, for compensation for personal injuries.

The plaintiff was a workman in the employ of the defendant, who was a master stevedore. On April 11, 1905, he was engaged with others in unloading sugar on board the steamship *Narcissus*. The plaintiff deposed that he and the others were discharging with a derrick; that a heavy iron chain was used fastened at one end to the mast and at the other end to the derrick; that the pin at the mast end of the chain fell out while one of the sets of bags was being hoisted, and that the set fell upon him and injured him. Evidence was also adduced on the plaintiff's behalf that the pin ought to have had a nut fixed at the end of it to keep it in position, and that the thread end of the pin was worn and would not hold a nut for any time. The defendant deposed that he provided ropes, slings, and chains to put round the sets, but that the rest of the tackle, viz., the derrick, shackles and pins, was provided by the shipowner, as was the usual practice with stevedores, and that he had nothing

C. A. 1907

BIDDLE v. HART.

to do with it; that at his request the derrick was fixed up by the ship's mate; that it was not his (the defendant's) business to examine the ship's tackle, and that until the accident he had no reason to suspect anything wrong. The defendant further deposed that he had been engaged for some years in loading and unloading the ships of this particular shipowner under a contract made six years ago.

Upon this evidence the county court judge withdrew the case from the jury upon objection taken on behalf of the defendant that the stevedore was not liable for a defect in the ship's tackle.

The plaintiff appealed to the Divisional Court (the Lord Chief Justice, and Darling and Ridley JJ.), and that Court (Ridley J. dissenting) affirmed the decision of the county court judge.

The plaintiff now appealed to the Court of Appeal.

Ruegg, K.C., and *Hinde*, for the plaintiff. In substance this is an application for a new trial. The question turned upon the construction of s. 1, sub-s. 1, and s. 2, sub-s. 1, of the Employers' Liability Act, 1880. (1) If the defendant chooses to use ship's tackle as part of his tackle it is still tackle "used in the business" within the meaning of s. 1, sub-s. 1, and if the tackle proves defective he cannot escape liability on the ground that it is not his own.

C. A. Russell, K.C., and *F. Mellor*, for the defendant. This tackle was never under the supervision of the stevedore, he had

(1) Sect. 1: "Where after the commencement of this Act personal injury is caused to a workman

"(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; . . . . the workman . . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.'

Sect. 2: "A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

"(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in a proper condition."

no reason to doubt the care and competency of the shipowner, and it was the usual practice of stevedores to take this particular portion of the tackle from the shipowner. In these circumstances it is unreasonable to require the stevedore to make an inspection of that tackle. The only duty of the employer is to take reasonable care in seeing that the plant used by his workmen is not defective. The plaintiff must prove, first, that the tackle in question was connected with the business of the employer; and, secondly, affirmatively that there was negligence on the part of the employer. On the facts of this case there was no duty on the employer to inspect or inquire into this tackle, and if there was a duty there is no evidence of any omission to discharge that duty.

SIR GORELL BARNES, PRESIDENT. This is an appeal from a decision of the Divisional Court, affirming by a majority the decision of the county court judge. [The President stated the facts, and continued:—] In the Divisional Court the judges differed. It is necessary to state the effect of the judgments of the majority. Darling J., as I read his judgment, held that because the part of the tackle which was broken was the ship's tackle there was no duty on the part of the defendant towards the plaintiff in relation to it. That appears to me to be also the effect of the judgment of the Lord Chief Justice, because he says: "That being the evidence, does this case afford an illustration of a third class of cases which has to be considered, viz., where there is no relation between the defendant, the employer sued, and the plant which breaks away, which is not the subject of any supervision of his, and which is not for this purpose controlled or supplied under any contract? For the purpose of this case, if there had been any contract shewing that the supervision had been left to the ship, then Mr. Mellor would have relied on *Kiddle & Son* v. *Lovett* (1) as being an exact authority. Mr. Hinde says because there is no contract, and because the plant was in fact being used, the ownership of the plant in question does not make any difference. So stated, I think he is probably right; but to my mind the argument overlooks the fact that you have to draw the line at some point, and it seems to me that where the evidence

(1) (1885) 16 Q. B. D. 605.

C. A. 1907

BIDDLE v. HART.

The President.

is uncontradicted that the thing supplied forms part of the gear of the ship, and that although put up for the job it is put up by the ship's people, not the servants of the employer, and is not tackle over which the employer has any control, the view taken by my brother Darling is right that there is no evidence that the defect arose from, or had not been discovered or remedied owing to the negligence of Hart, or of some person in the service of Hart and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." My reading of that is substantially the same as my reading of the judgment of Darling J., that because the plant which was broken in this case was not the plant of the defendant, but was supplied by the ship, the defendant owed no duty whatever to the plaintiff in relation to it. Ridley J. took a different view, and therefore, it is not necessary to read his judgment. The question turns upon two short provisions of the Employers' Liability Act, 1880. Sect. 1 provides that where personal injury is caused to a workman (1.) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. That puts the workman in the position of an independent person, and gets rid of the defence of common employment which might otherwise have been available to the employer. Then s. 2 says that a workman shall not be entitled under this Act to any right of compensation or remedy against the employer: "(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." That being so, the decision at present is that on the facts presented to the Court, it being clearly established that the tackle which was broken though used by the employer was not his tackle, he had no duty whatever in relation to it. In my opinion that cannot be the true view of the law. He may have discharged that

duty, and whether he has discharged that duty or not is another question. In this case there can be little doubt that most of the arguments addressed to us on behalf of the respondent ought to have been the subject of an address to the jury on the question whether there had been a discharge by the respondent. In my opinion, if the employer uses plant which is not his own for the purpose of doing something which he has engaged to do, it cannot possibly be said that he has no duty whatever in relation to that plant. Otherwise he would be able to take anything that came from anybody and to use anything in the work he was engaged upon without making any inquiry at all, and then say, in the event of an injury arising from a defect in the plant, that he had nothing to do with it, and so escape liability. That, to my mind, is unreasonable, and is not consistent with the 2nd section. What I take to be the meaning of that is that if the employer uses plant which does not belong to him, he may have a duty in regard to the persons employed to take reasonable care to see that it is proper for the purpose for which it is used. It may be that in a case of this character, although he had that duty, yet, if he had dealt with these shipowners before and had never had any cause for complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have evidence that the plant was old and had been in use for a long time, the jury might say they were not satisfied that reasonable care had been taken to see that it was in a proper condition. Once establish the duty the question is, What would the jury consider a discharge of that duty? In other words, the case must go to the jury. Some confusion appears to have arisen between the purely legal question whether the duty exists and the question of fact whether it has been discharged. It cannot be said in this case that there was no evidence on which the case could go to the jury. I therefore think that the judgment of the Divisional Court was not right, and that this case must be sent back for a new trial. The appeal will be allowed.

FARWELL L.J. I am of the same opinion. I do not see how the respondent can succeed on this appeal unless he can induce

C. A. 1907

BIDDLE v. HART.

Farwell L.J

us to affirm the proposition that anyone who uses tackle which is not his own in the sense that it has either been purchased or hired by him, but is gratuitously lent to him, is not bound to take reasonable care to see that that tackle is in a proper condition. The Act of 1880 was a mode of depriving the employer of particular defences which were open to him at common law, such as common employment and the like. That is pointed out by A. L. Smith J. in *Howe* v. *Mark Finch & Co.* (1) The case must therefore be considered as if this plaintiff were an ordinary person employed to use this tackle by the defendant for the purposes and for the profit of the defendant. In such a case the defendant has to take reasonable care that the tackle, whether his own, or hired, or lent, is reasonably fit for the purpose for which he employed the plaintiff to use it. I see nothing to take this out of s. 1. There is no question but that the ship's tackle was used for the purposes of the stevedore's business. The next question arises upon the construction of sub-s. 1 of s. 2, which gives the workman no right against the employer for a defect in the condition of the plant "unless the defect arose from, or had not been discovered or remedied owing to the negligence of the employer," &c. The word "remedied" there is distinct from "discovered," and it is plain that the Act applies to cases where the employer might have no power to remedy the defect, because it might be that the shipowner would not allow him to touch the tackle; but the employer would not thereby escape liability, because the section also says "had not been discovered." I feel no doubt in my own mind that the county court judge decided the present case on the ground that there was no duty imposed on the employer, because he says in terms that the stevedore had nothing whatever to do with the tackle, because it was not his tackle. That was the view put forward in the argument on behalf of the stevedore, and it appears to me that that was also the view taken by the Divisional Court. In my opinion there was, in the present case, some evidence of negligence to go to the jury, and this case must therefore be sent back to the county court.

(1) (1886) 17 Q. B. D. 187.

BUCKLEY L.J. I am of the same opinion. With great deference to the Lord Chief Justice and Darling J., they appear to me to have confused two things which are distinct, viz. :—(1.) the existence of a duty and (2.) negligence in the performance of the duty. The former of these is to be answered by ascertaining whether in the language of the Act of Parliament the plant was connected with or used in the business of the employer. The Lord Chief Justice, after discussing the cases, is reported as saying: "There is no case which says that where the plant is outside the region of the plant for which the employer would be responsible under s. 2 there is no liability. That is the question we have to consider here." Sect. 2 must here be a clerical error, for s. 1 creates the responsibility and s. 2 limits it, and the word "no" before liability must, I think, have crept in by mistake. The point is, however, that this sentence implies that in this case there is found plant which is outside the region for which the employer would be responsible. I agree that this is so if the plant was not connected with or used in the business of the employer; but that is not the question to which the Lord Chief Justice was addressing himself. He was addressing himself to negligence in the discharge of the duty, because later on he says: "You have to draw the line at some point, and it seems to me where the evidence is uncontradicted that the thing supplied forms part of the gear of the ship, and that although put up for the job it is put up by the ship's people, not the servants of the employer, and is not tackle over which the employer has any control, the view taken by my brother Darling is right that there is no evidence that the defect arose from or had not been discovered or remedied owing to the negligence of Hart." In my opinion there is no question, having regard to the statute and to the evidence, that there was a duty here on the employer; this was plant connected with or used in his business. There was another question, namely, whether "the defect had not been discovered or remedied owing to the negligence of the employer." Under those words of s. 2, sub-s. 1, there was an issue of fact to be tried, namely, whether, the employer had been guilty of negligence, that was a question for the jury; but the learned county court judge did not proceed upon the ground that there was no evidence of negligence to go

C. A. 1907

BIDDLE v. HART.

to the jury, nor in my opinion can the judgment of the Divisional Court be upheld on that ground. I think that there was prima facie evidence of negligence to go to the jury, and that there ought to be a new trial.

The appeal must be allowed.

Appeal allowed.

Solicitors : *Liddle & Liddle ; William Hurd & Son.*

H. B. H.

C. A. 1907 *Jan.* 28.

[IN THE COURT OF APPEAL.]

HOYES AND ANOTHER *v.* TATE AND OTHERS.

Practice—Costs—Trial with Jury—Separate Issues—Issue on which Defendant succeeds—No Order affecting Costs of Issue—Form of Judgment—"Event"—Order LXV., *r.* 1.

In an action tried with a jury where there are separate issues, and the plaintiff obtains a verdict and judgment, but the defendant is successful as to one of the issues, if the judge makes no order with regard to that issue interfering with the incidence of costs under Order LXV., r. 1, the defendant is entitled to have the judgment drawn up so as to give him the costs of the issue on which he succeeds.

APPEAL from the judgment of Lawrance J. at the trial of the action with a jury.

The plaintiffs and the first-named defendant were respectively in possession of adjoining houses and grounds. The statement of claim alleged that in the course of building operations upon the first defendant's land the defendants trespassed on the plaintiffs' land and damaged a fence, and cut down and removed a tree thereon. The defendants by their defence denied the trespass and damage, and said that the tree and fence were upon the first defendant's land, and not upon that of the plaintiffs; and, while denying liability, they brought into Court 5*l.* as sufficient to satisfy the plaintiffs' claim.

The evidence at the trial shewed that workmen, who were employed on certain building operations on the first defendant's land, cut down the tree in question by the direction of the architect employed by the first defendant, and in doing so

trespassed on the plaintiffs' land and damaged the fence, and that the tree when cut fell upon the plaintiffs' land. The jury found that the tree was upon the first defendant's land, that the fence where the damage was done was the property of the plaintiffs, and they awarded the plaintiffs 2*l.* 10*s.* for the damage to the fence and 8*l.* for the trespass. Lawrance J. directed judgment to be entered for the plaintiffs for 10*l.* 10*s.* and the general costs of the action on the High Court scale; and, upon being asked by the defendants to direct judgment to be entered for them upon the issue as to the ownership of the tree with the costs of that issue, he took time to consider the matter, and ultimately said that he would make no order.

The certificate of the associate stated, so far as is material to this case, that "the jury found that the tree was in the grounds of" the first defendant, "that the fence . . . . is the property of the plaintiffs, and award 2*l.* 10*s.* for damage to the fence and 8*l.* for the trespass. The judge directed that judgment should be entered for the plaintiffs for 10*l.* 10*s.* and general costs of the action on the High Court scale. . . . . The judge having considered the question of costs on issue as to ownership of tree . . . . stated that he made no order."

Before the judgment was drawn up the defendants appealed from the refusal of the learned judge to direct judgment to be entered for them upon the issue as to the ownership of the tree.

Jan. 25. *J. F. P. Rawlinson, K.C.*, and *A. B. Cane*, for the defendants. The learned judge was wrong in refusing to direct judgment to be entered for the defendants upon the issue as to the ownership of the tree upon which they had succeeded. Inasmuch as the learned judge has not made an order depriving the defendants of the costs of that issue, those costs ought to follow the event under Order LXV., r. 1, and the defendants are entitled to them. Unless, however, judgment is directed to be entered for the defendants upon that issue, or perhaps some direction given to the taxing Master, the defendants will not be allowed the costs of that issue upon taxation. Though the finding of the jury upon that issue has been entered in the

C. A. 1907

HOYES v. TATE.

associate's certificate, inasmuch as the learned judge has merely directed judgment to be entered for the plaintiffs for 10*l.* 10*s.* and the general costs of the action, the judgment cannot be drawn up in the Central Office so as give the defendants the costs of that issue. The taxing Master can only tax the costs of an issue upon a judgment dealing with that issue, and not upon the verdict as entered in the associate's certificate.

The word "event" in Order LXV., r. 1, cannot mean the verdict of the jury, and therefore it cannot mean that the costs shall follow the verdict: per Bramwell L.J. in *Myers* v. *Defries*. (1) The event must depend upon the judgment which is actually entered. In *Myers* v. *Defries* (*No.* 2) (2) it was held that "event" was to be read distributively, so as to give each party the costs of the issues on which he had succeeded, and in that case the judge at the trial directed judgment to be entered upon the various issues. In *Jones* v. *Curling* (3) the action was brought to recover several closes of land, and the jury found a verdict for the plaintiff for some of the closes and for the defendants for the rest. Lord Coleridge C.J., who tried the case, directed judgment to be entered for the plaintiff for the closes as to which he had succeeded and for the defendants for the closes as to which they had succeeded, and the Court of Appeal seemed to have assumed that that was the proper course to adopt. In *Holtby* v. *Hodgson* (4) Lord Esher M.R. said that since the Judicature Act the associate had to enter the findings of fact, and if nothing more than that took place at nisi prius the associate's certificate would only be a certificate of the verdict of the jury; and that therefore, in order to get everything into one form, the judge at nisi prius had now power to direct judgment to be entered according to the verdict. Those authorities shew that the judge at the trial ought to direct judgment to be entered upon the issues, otherwise the party who succeeds upon an issue will not get the costs of that issue upon taxation.

Marshall-Hall, *K.C.*, and *W. O. Hodges*, for the plaintiffs. The appeal is misconceived. If the issue as to the ownership of

(1) (1879) 4 Ex. D. 176, at p. 180.
(2) (1879, 1880) 5 Ex. D. 15, 180.
(3) (1884) 13 Q. B. D. 262.
(4) (1889) 24 Q. B. D. 103, at p. 107.

the tree is a separate issue, the defendants upon this certificate and the direction of the learned judge as to entering judgment will get the costs of that issue. If upon taxation they are not allowed those costs they can then appeal. The appeal is premature, there being no judgment drawn up and no taxation of costs.

Jan. 28. COLLINS M.R. There can be no doubt that the defendants are entitled to the costs of the issue upon which they have succeeded. But this appeal seems to us to be altogether wrong. The defendants have appealed when there is nothing in existence except the certificate of the associate. We have had the very best advice upon this matter from those who are most competent to give it, and we are told that when the certificate of the associate is taken to the proper office with a request that judgment be entered upon it, inasmuch as the learned judge has made no order interfering with the incidence of the costs as prescribed by Order LXV., r. 1, the judgment will be drawn up in such a form as to give the defendants the costs of the issue as to the ownership of the tree upon which they have succeeded. The form of judgment which will be drawn up upon the associate's certificate has been supplied to us, and that form gives the defendants all they ask for. The result is that the defendants upon this certificate are entitled to have the judgment drawn up in the form now before us, making the costs follow the event, and the appeal is wholly unnecessary. That being so, the appeal must be dismissed.

COZENS-HARDY L.J. and FLETCHER MOULTON L.J. agreed.

Appeal dismissed.

The form of the judgment above referred to was supplied to the Court by the Central Office (Writ, Appearance, and Judgment Department), and, after reciting the associate's certificate, it proceeded as follows: "Therefore it is this day adjudged that the plaintiffs recover against the defendants 10*l.* 10*s.* and (except as herein otherwise adjudged) the general costs of the action on the High Court scale. . . . . And the jury having found that the

C. A. 1907

HOYES v. TATE.

tree referred to in the pleadings was in the grounds of" the first defendant, "and the judge having made no order as to the costs of the issue as to the ownership of the said tree, It is further adjudged that on taxation the defendants do have their costs of the said issue as to the ownership of the said tree."

Solicitor for plaintiffs: *R. W. Beckwith.*
Solicitors for defendants: *Huntington & Leaf.*

A. M.

C. A. 1907 *Feb.* 25.

[IN THE COURT OF APPEAL.]

JOSEPH THORLEY, LIMITED *v.* ORCHIS STEAMSHIP COMPANY, LIMITED.

Ship—Contract of Affreightment—Bill of Lading—Exception Clause—Deviation.

Goods were shipped for carriage under a bill of lading, which contained an exception clause exempting the shipowners from liability for loss arising from (inter alia) negligence of stevedores employed by them in discharging the ship. The ship deviated from the voyage as described in the bill of lading. In the process of discharging the ship at the port of destination the goods were damaged through the negligence of the stevedores employed by the shipowners. In an action brought by the owners of the goods to recover the amount of the loss so occasioned to them:—

Held (affirming the judgment of Channell J.), that the defendants, having, by reason of the deviation, failed to perform the bill of lading contract, were not entitled to set up by way of defence the exception clause therein contained, and therefore the action was maintainable.

Balian v. *Joly, Victoria & Co.*, (1890) 6 Times L. R. 345, followed.

APPLICATION by the defendants for judgment or a new trial in an action tried before Channell J. and a special jury. (1)

The action was by owners of goods shipped under a bill of lading against shipowners in respect of damage to those goods. The plaintiffs, who were manufacturers of food-stuffs for cattle, were owners of, and indorsees of the bill of lading given with respect to, 897 tons of locust beans which were shipped on the defendants' steamship *Orchis*, described in the bill of lading as "now lying in the port of Limassol and bound for London,"

(1) Reported ante, p. 243.

for delivery in the port of London. The bill of lading contained an exception clause exempting the shipowners from liability for loss arising from (inter alia) "Any act, neglect, or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants, or agents of the owners, in the management, loading, stowing, discharging, or navigation of the ship, or otherwise." The *Orchis*, when loaded with the beans, instead of going straight to London, proceeded from Limassol to a port in Asia Minor, and thence to a place in the North of Palestine, and thence to Malta, and so to London; and there had therefore been a deviation from the voyage as specified in the bill of lading. When the beans had been unloaded, it was found that they had been damaged through admixture with a poisonous earth called terra umber, a large quantity of which had also been carried on the ship as ballast, and the plaintiffs were consequently unable to make use of the beans. They thereupon brought the action claiming damages in respect of the loss so occasioned to them. The defendants by way of defence alleged that the damage had been caused solely by the act, neglect, or default of the master or stevedores in the loading, stowing, or discharging of the vessel, for which by the terms of the bill of lading the defendants were not liable. The plaintiffs, who did not know of the deviation till after they had obtained discovery of documents in the case, in reply alleged that the *Orchis* had deviated from the ordinary course of the voyage specified in the bill of lading, and therefore the defendants were not entitled to rely on the provisions of the exception clause. The jury found that the terra umber and the locust beans were properly stowed on the ship, and separated, and that the admixture of them was caused during the discharge of the ship, and they assessed the damages at 240*l.*

Upon these findings Channell J., on the authority of *Balian* v. *Joly, Victoria & Co.* (1), gave judgment for the plaintiffs for the damages found by the jury. (2)

Scrutton, K.C. (*Lewis Noad* with him), for the defendants. In this case the deviation cannot possibly have conduced to the

(1) 6 Times L. R. 345. (2) Reported ante, p. 243.

C. A. 1907

JOSEPH THORLEY, LIMITED v. ORCHIS STEAMSHIP COMPANY, LIMITED.

damage to the beans, which the jury has in effect found to have been caused by the negligence of the stevedores in discharging the ship. That being the case, the deviation cannot have the effect of rendering the exception clause inapplicable. As in the case of other contracts, a term in a contract of affreightment, such as the warranty of seaworthiness, or the obligation not to deviate, which would constitute a condition precedent, while the contract was executory, must, when the contract is executed by the goods having been carried to their destination, and the holder of the bill of lading has thereby received the whole or a substantial part of the consideration for the contract, be regarded as merely a warranty in the stricter sense, i.e., a collateral agreement on which an action may be maintained to recover damages in respect of any loss which can be proved to have been occasioned by a breach of it: see *Behn* v. *Burness* (1); *Ellen* v. *Topp* (2); *Pust* v. *Dowie* (3); *Graves* v. *Legg*. (4) In this case the loss that occurred could not be attributed to the deviation, and therefore any damages would be merely nominal. The obligation not to deviate stands on the same footing in this respect as the warranty of seaworthiness, which operates as a condition precedent to the obligation of a charterer to load the ship, but, when the goods have been shipped and carried to the port of destination, ceases to be a condition, the result being that the cargo owner cannot then repudiate the contract on the ground that the ship was not seaworthy, but, if that was so, can only sue for such damage to the cargo as may be considered attributable to the ship's being unseaworthy: *Havelock* v. *Geddes* (5); *Worms* v. *Storey* (6); *Kopitoff* v. *Wilson* (7); *The Pentland*. (8) See also Story on Bailments, 9th ed. ss. 413a, 413b, 413c, 413d, and the American cases—*Collier* v. *Valentine* (9); *Hart* v. *Allen* (10) —there cited. In all the cases where deviation has been held to preclude the shipowner from setting up the exception clause, such as *Davis* v. *Garrett* (11), the damage was caused by, or at any

(1) (1863) 3 B. & S. 751.
(2) (1851) 6 Exch. 424.
(3) (1863) 32 L. J. (Q.B.) 179; (1864) 5 B. & S. 20.
(4) (1854) 9 Exch. 709, at p. 716.
(5) (1809) 10 East, 555, at p. 564.
(6) (1855) 11 Exch. 427.
(7) (1876) 1 Q. B. D. 377.
(8) (1897) 13 Times L. R. 430
(9) (1848) 11 Mo. 299.
(10) (1833) 2 Watts, 114.
(11) (1830) 6 Bing. 716.

rate occurred during, the deviation, which was not the case here: see *Leduc* v. *Ward* (1); *The Dunbeth*. (2) In *Scaramanga* v. *Stamp* (3) the question which arises here was left open. In *Balian* v. *Joly, Victoria & Co.* (4) the loss occurred during the deviation; and, though it was suggested in the judgments that the deviation displaced the bill of lading contract altogether, that suggestion was merely obiter, and was wholly unnecessary for the decision of the case, and therefore that decision cannot be considered as concluding the present case. The contract of affreightment does not stand on the same footing as the contract of insurance as regards the effect of deviation. It was given in the Court below as a reason why the deviation should sweep away the exception clause that it would affect any insurance on the goods. It is difficult, however, to see how the fact that the cargo owner has entered into an independent contract with a third party can affect the bill of lading contract. The exception clause and the policy of insurance do not necessarily cover the same risks. There was no evidence that there was any insurance in this case. Policies of insurance generally contain a deviation clause at the present day.

J. A. Hamilton, K.C., and *Chaytor*, for the plaintiffs. Both on the true construction of the bill of lading, and also on authority, the plaintiffs are entitled to succeed. On the principles which have been laid down in *Davis* v. *Garrett* (5) and other decisions on the subject prior to *Balian* v. *Joly, Victoria & Co.* (4), and which have been treated as well established for a long period of time, the deviation prevents the defendants from availing themselves of the exception clause. Furthermore, the decision in *Balian* v. *Joly, Victoria & Co.* (4) is really conclusive of the present case, and that decision is binding on this Court. In the case of policies of insurance, it is clear that upon a deviation the policy is thenceforward vitiated, and the underwriter is released from liability in respect of any loss which may subsequently happen, the reason being that which was given by Lord

(1) (1888) 20 Q. B. D. 475.
(2) [1897] P. 133.
(3) (1880) 5 C. P. D. 295, at p. 299.
(4) 6 Times L. R. 345.
(5) 6 Bing. 716.

C. A. 1907

JOSEPH THORLEY, LIMITED v. ORCHIS STEAMSHIP COMPANY, LIMITED.

Mansfield in the case of *Lavabre* v. *Wilson* (1), namely, that a different voyage has been substituted for that contemplated in the policy of insurance. The same principle applies to contracts of affreightment. The effect of deviation is to substitute a different voyage for that contracted for in the bill of lading contract, and therefore the shipowner, who has not performed that contract, cannot set up the exception clause, which formed part of it, and was only applicable to the voyage as therein contracted for by the parties. That is really the principle which is necessarily involved in the decision in *Balian* v. *Joly, Victoria & Co.* (2), and has been treated in all the text-books on the subject as established by that decision. Even if the statements in the judgments to that effect can be treated as merely obiter, as they have stood unquestioned for about seventeen years, the Court would hardly overrule them now. The plaintiffs never contracted that, on a voyage other than a voyage direct from Limassol to London, the defendants should not be liable for loss arising from the negligence of their servants or employees. The propositions laid down in *Behn* v. *Burness* (3), and similar cases upon which the defendants rely, really have no application in the present case. In that case the question was whether the charterer was bound to load the ship, and not whether the shipowner could set up the exception clause. The fact that the damage in this case occurred in the course of discharging the ship, after the voyage was over, does not help the defendants. Unnecessary delay is equivalent to deviation. The discharge of the ship was delayed by the deviation from the ordinary course of the voyage. According to the authorities, where the ship is unseaworthy or there has been a deviation, the only possible way in which the shipowner could, on any view, escape liability for subsequent loss or damage to the cargo would be by shewing that the loss or damage would have occurred all the same, whether the ship had been seaworthy or not, or whether the deviation had taken place or not. It is not very material here whether the effect of the deviation is altogether to displace the exception clause, or only to displace it unless the shipowners can shew that the loss must

(1) (1779) 1 Doug. 4th ed. p. 284. (2) 6 Times L. R. 345.
(3) 3 B. & S. 751.

have taken place whether there had been a deviation or not. The defendants here must say that, whether there had been a deviation or not, the stevedores employed in discharging the ship would equally have been guilty of negligence by which the damage would have been occasioned to the goods. It is impossible for them to say this, for the circumstances under which the goods would have been discharged might have been wholly different if the goods had arrived earlier. The decision in *Balian* v. *Joly, Victoria & Co.* (1) shews that the effect of the deviation in preventing the shipowner from setting up the exception clause cannot depend on whether the damage occurred in consequence of or during the deviation; because that could have no bearing on the clause in question in that case, which was one limiting the shipowners' liability to 5*l.* on each bale of goods, in the absence of a declaration of value at the port of shipment. [They also cited *Lilley* v. *Doubleday* (2); Carver on Contract of Carriage by Sea, 4th ed. s. 288, p. 354; Abbott on Shipping, 14th ed. p. 525; *Phelps, James & Co.* v. *Hill* (3); *Wilson, Sons & Co.* v. *Owners of Cargo per the Xantho* (4); Parsons on Marine Insurance, 1868 ed. p. 5.]

Scrutton, K.C., in reply.

COLLINS M.R. In this case the plaintiffs were the owners of a cargo of locust beans shipped on board the defendants' ship under a bill of lading, of which the plaintiffs became indorsees. The bill of lading described the ship as "now lying in the port of Limassol and bound for London" and contained the usual exceptions, including an exception of loss arising from negligence of stevedores in loading or discharging the ship. When the cargo had been unloaded at the port of destination, it was found that it had been injuriously affected by being admixed with a poisonous earth called terra umber, a quantity of which was carried in the ship as ballast, and this had occurred through the negligence of those employed in discharging the cargo. Prima facie, damage occasioned by such negligence would be one

(1) 6 Times L. R. 345.
(2) (1881) 7 Q. B. D. 510.
(3) [1891] 1 Q. B. 605, at p. 617.
(4) (1887) 12 App. Cas. 503, at pp. 510, 511.

C. A. 1907

JOSEPH THORLEY, LIMITED v. ORCHIS STEAMSHIP COMPANY, LIMITED.

Collins M.R.

of the matters covered by the exception clause in the bill of lading, but the plaintiffs contend that the defendants cannot rely upon that clause, because the ship deviated from the voyage contracted for in the bill of lading. There is no doubt that the ship did so deviate, because, instead of proceeding direct from Limassol to London, she went first to two ports in Asia Minor and thence made her way to London. The question is as to the legal effect of that deviation under the circumstances of the present case. Channell J. held that it had the effect of displacing the express contract contained in the bill of lading, and so precluding the shipowners from setting up the exception clause therein contained. He based that decision upon the case of *Balian* v. *Joly, Victoria & Co.* (1) The decision in that case, which has now stood for about seventeen years, appears to me to be in point, and, unless it can be made out that for any reason we ought not to follow it, I think it concludes the present case. In that case tobacco was shipped on board a ship for carriage from Lagos to London. By the bill of lading certain perils were excepted, and there was also a clause by which it was provided that, in the case of packages over 5*l.* each in value being shipped, the value thereof must be declared before shipment, otherwise the defendants would not be liable for more than 5*l.* per package. The tobacco, which was shipped in bales, the value of each bale being over 5*l.*, ultimately arrived in London, but by another ship and another route than that contemplated in the bill of lading. Upon its arrival it was found that a number of the bales were damaged, and an action was brought by the shippers in respect of that damage. There having been no declaration of the value before shipment, the shipowners sought to set up by way of defence the clause in the bill of lading by which, in the absence of a declaration of value, their liability was to be limited to 5*l.* in respect of each package. The Court of Appeal, consisting of Lord Esher M.R., Fry L.J. and Lopes L.J., held that the fact of deviation was a complete answer to the defence so set up, as having the effect of displacing the provision in the contract upon which the defendants relied and precluding them from setting it up. Upon looking at the grounds of the

(1) 6 Times L. R. 345.

judgments given in that case, they appear to me to affirm a principle which is as much applicable to the present case as to that case. The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit. It may be, no doubt, that, although that condition is broken, the circumstances are such as to give rise to an implied obligation on the part of the cargo owner to pay the shipowner the freight, and, it may be, to perform other stipulations which may be implied under the circumstances from the fact of the carriage of the cargo to its destination; but that is quite consistent with the effect of the deviation being to displace the special contract expressed in the bill of lading. This Court appears to me really to have held in *Balian* v. *Joly, Victoria & Co.* (1) that this is the true principle with regard to the effect of deviation, and therefore it is not necessary to trace the loss which has occurred to the deviation. In the case of *Balian* v. *Joly, Victoria & Co.* (1) the fact that there had been a deviation had no relation to the value of the tobacco; nor, if the damage to it was attributable to the deviation, could that fact have had any bearing upon the question whether the shipowners were entitled to set up by way of defence the particular stipulation of the bill of lading upon which in that case they were relying; and yet this Court held that the effect of the deviation was to prevent them from setting up that stipulation. It seems to me that really the only way, in point of principle, in which the decision in *Balian* v. *Joly, Victoria & Co.* (1) can be explained is that the Court regarded the deviation as amounting to failure to comply with a condition precedent, and therefore as displacing the express contract, independently of any question whether the deviation had any bearing on the particular loss complained of by the cargo owners. If that be the true principle, it is applicable, as it appears to me, to the present case. There

(1) 6 Times L. R. 345.

C. A. 1907

JOSEPH THORLEY, LIMITED v. ORCHIS STEAMSHIP COMPANY, LIMITED.

Collins M.R.

is no connection, it is true, between the deviation and the particular negligence which in this case occasioned the loss, but that is quite immaterial if the principle underlying the decision in *Balian* v. *Joly, Victoria & Co.* (1) applies, namely, that the ship-owner cannot set up the exception clause in the bill of lading contract, which only exists for his benefit, if he has not performed a condition precedent upon which his right to rely on that contract depends. I do not think that it is necessary for me to go through the authorities which have been cited, but it seems to me that the last authority to which I have referred is really consistent with all the earlier authorities on the subject as far back as the time of Lord Mansfield. I would only add that I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases. If such a term of the contract is an absolute condition, failure to comply with which displaces the contract of insurance, it appears to me that it must be a condition in the same sense in the case of the contract of affreightment, and failure to comply with it ought in principle to produce the same results, which is the case if its effect is to displace the special contract, leaving only such terms of it surviving as may be implied from the circumstances and the conduct of the parties by way of new contract arising out of the old contract. On these grounds I think that the judgment of the learned judge was right, and this application must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. I think the decision of this Court in *Balian* v. *Joly, Victoria & Co.* (1) really governs this case, for it appears impossible to distinguish the facts of the two cases so as to render the reasoning upon which that decision was founded inapplicable to the present case. The principle upon which this Court acted in *Balian* v. *Joly, Victoria & Co.* (1) appears to have been laid down as long ago as the time of Lord Mansfield, who, in the passage

(1) 6 Times L. R. 345.

which was cited from the case of *Lavabre* v. *Wilson* (1), said: "The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is that the party contracting has voluntarily substituted another voyage for that which has been insured." Similarly it appears to me that the shipowner who, by deviating, has voluntarily substituted another voyage for that contracted for in the bill of lading, cannot claim the benefit of an exception contained in the special contract, which is only applicable to the voyage mentioned in that contract.

FLETCHER MOULTON L.J. I agree. The cases shew that, for a long series of years, the Courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading. In what position, then, does he stand? He has carried the goods to their place of destination, and is therefore entitled to some remuneration for that service, of which their owner has received the benefit. The most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this, but in the present case the plaintiffs do not contest his right to stand in that position. That, however, still leaves him liable to the plaintiffs for the amount which they have recovered in this action.

Application dismissed.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 1 Doug. 4th ed. 284, at p. 290.

E. L.

C. A.
1906
Dec. 14, 15, 21.

[IN THE COURT OF APPEAL.]

CAINE AND OTHERS *v.* PALACE STEAM SHIPPING COMPANY.

Ship—Seaman—Contract of Service for Ordinary Voyage—Carriage of Contraband—Refusal to proceed to Belligerent Port—Right to Wages.

The plaintiffs, who were British seamen, signed an agreement to serve on a British ship on a voyage not exceeding three years' duration to any ports within 75 degrees N. and 60 degrees S. latitude, commencing at Cardiff and proceeding thence to Hong Kong, and to end at a port in Europe. At the time of signing the plaintiffs knew that war had broken out between Russia and Japan, that the ship was to carry a cargo of coal to Hong Kong, and that coal was treated by both belligerents as contraband of war. After arrival at Hong Kong the plaintiffs were told by the master that the ship was going on to Sasebo, a port and naval base in Japan, but within the geographical limits of the voyage. The plaintiffs refused to go on to Sasebo with coal on board, and were thereupon charged before a Court of competent jurisdiction at Hong Kong with having impeded the progress of the ship by refusing to go to sea, and were convicted and imprisoned. Other sailors were substituted for the plaintiffs, and the ship went on to Sasebo. The plaintiffs, after their discharge from prison, were returned to this country as distressed seamen. The plaintiffs having brought an action to recover wages from the date of their trial at Hong Kong, and also general damages :—

Held, that the voyage from Hong Kong to Sasebo ceased to be an ordinary commercial voyage such as alone was contemplated by the agreement, and the plaintiffs were therefore justified in refusing to proceed ; that the plaintiffs were entitled to wages, not merely up to the date of their arrival in this country, but up to the final settlement of their claims by the decision of the Court of Appeal, but that under the circumstances they were not entitled also to general damages for breach of the agreement.

Held, further, that the conviction of the plaintiffs at Hong Kong did not operate as an estoppel against their claim for wages.

APPEAL of the defendants and cross-appeal of the plaintiffs from the judgment of Lawrance J. in an action tried without a jury.

The defendants were the owners of the steamship *Franklyn*, and the plaintiffs were members of the crew of that vessel. By an agreement dated December 5, 1904, and made at Cardiff, the plaintiffs agreed to serve the defendants in the *Franklyn* on a voyage not exceeding three years' duration to any ports within

75 degrees N. and 60 degrees S. latitude, commencing at Cardiff and proceeding thence to Hong Kong via Barry, and to end at a port in Europe. At the date of the agreement war had broken out between Russia and Japan to the knowledge both of the plaintiffs and of the defendants, and the plaintiffs were aware that the ship was to carry a cargo of coal, and, further, that coal was treated as contraband of war by both the belligerents. The ship duly sailed from Cardiff with a cargo of coal on board, and arrived at Hong Kong on February 24, 1905. After arrival at that port the plaintiffs were told that the ship was going on to Sasebo, a port in Japan, which was within the geographical limits of the voyage as laid down in the articles of agreement, and it was then that the plaintiffs learned for the first time that they were required to go on to Sasebo with a contraband cargo. The plaintiffs refused to go on to Sasebo with coal on board, and the master of the ship consulted the harbour-master, who also held the post of marine magistrate, as to the course to be taken with the plaintiffs in consequence of their refusal, and in the result the plaintiffs were brought before the marine magistrate by the master upon a charge under s. 225 of the Merchant Shipping Act, 1894, of having impeded the progress of the ship by refusing to go to sea; upon this charge they were convicted by the marine magistrate and sentenced to seventy days' imprisonment. After serving their sentence the plaintiffs came out of prison on May 1, 1905, and were eventually sent back as distressed seamen to this country, where they arrived on July 15, 1905. The *Franklyn* went on with the cargo of coal to Sasebo, the places of the plaintiffs being filled by Chinamen, and eventually arrived in England in the summer of 1906. The plaintiffs brought the present action to recover wages from the date of their being tried at Hong Kong until the final settlement of their claims, and also general damages for breach of the agreement by the defendants. Lawrance J. held that the plaintiffs were justified in refusing to continue the voyage at Hong Kong, and that their conviction was unlawful and afforded no answer to the action, and gave judgment for the plaintiffs for the amount of their wages down to the date of their arrival in this country. The defendants appealed, and the plaintiffs gave a notice of

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

cross-appeal on the ground that they were entitled to recover wages down to final settlement of their claim and also to recover general damages.

J. A. Hamilton, K.C. (*Dawson Miller* with them), for the defendants. The plaintiffs are not entitled to recover in the action. The limits of the voyage included the area of hostilities, and the plaintiffs signed the articles with a full knowledge that a state of war existed and that the cargo to be carried was contraband of war, and they contracted for the voyage under these conditions. The articles were for an ordinary commercial voyage, and the voyage as actually carried out was an ordinary and lawful commercial voyage; nothing occurred to change its character after the articles had been signed. A contract to carry contraband of war is not illegal, even if it involves running the blockade of a port of one of the belligerents: *Ex parte Chavasse, In re Grazebrook* (1); and the carriage of contraband involves loss of the freight and confiscation of the cargo, but not of the ship: *The Neutralitet.* (2) It is for the plaintiffs to shew that new circumstances arose which would relieve them from the contract which they signed, and they must shew that the character of the voyage had been thereby altered: *Austin Friars Steam Shipping Co.* v. *Strack.* (3) The mere fact that the plaintiffs did not know at the time of signing the articles that the ship was to go on from Hong Kong to Sasebo was not sufficient to alter the character of the voyage; that merely means that the voyage signed for proved somewhat more dangerous than expected, which is not sufficient to absolve a seaman from the performance of his contract of service. The case of *Burton* v. *Pinkerton* (4), which was relied on for the plaintiffs in the Court below, is distinguishable, for there the articles had been signed before war broke out; and *O'Neill* v. *Armstrong, Mitchell & Co.* (5) is also distinguishable, on the ground that a continuance of the voyage would necessarily have involved a breach of the Foreign Enlistment Act, 1870. The cases in the Divisional Court of

(1) (1865) 4 D. J. & S. 655.
(2) (1801) 3 C. Rob. 295.
(3) [1905] 2 K. B. 315.
(4) (1867) L. R. 2 Ex. 340.
(5) [1895] 2 Q. B. 70, 418.

Lloyd v. *Sheen* (1) and *Sibery* v. *Connelly* (2) are wrong and should be overruled, though they may be distinguished on the ground that they had reference to the question of the termination of the service under the Merchant Shipping Act, 1894, and there had been no criminal proceedings against the seamen who had refused to proceed on the voyage.

Further, the conviction of the plaintiffs under s. 225 of the Merchant Shipping Act, 1894, for refusing to proceed to sea was a lawful conviction by a tribunal having jurisdiction in the matter, and operates as an estoppel against the maintenance of the present action. It was admitted at the trial that the plaintiffs could not maintain a claim for damages for malicious prosecution, and the conviction obliges the plaintiffs to say that, as regards themselves, the voyage was terminated by their doing something which they had no right to do.

As to the question of damages raised by the cross-appeal, the judge decided it as a jury, and there is no ground for interfering with his decision.

S. T. Evans, K.C., and *A. Neilson* (*Morgan Morgan* with them), for the plaintiffs. The plaintiffs were within their rights in refusing to go on from Hong Kong to Sasebo with a contraband cargo on board. The voyage contemplated by the articles was an ordinary commercial voyage, and this voyage was not an ordinary commercial voyage within the principle of the decision in *Burton* v. *Pinkerton*. (3) It is admitted that it is not illegal to carry a contraband cargo, even to the port of a belligerent, but the illegality of the voyage is immaterial to the present question. The voyage contemplated by the articles being an ordinary commercial voyage, its character was changed and the danger to the plaintiffs increased by proceeding from Hong Kong to Sasebo, which was not merely a port of one of the belligerents, but was actually a naval base ; the voyage had therefore ceased to be an ordinary commercial voyage by reason of the increased danger, and the contract had been altered to the detriment of the plaintiffs : *Burton* v. *Pinkerton* (3) ; *O'Neill* v. *Armstrong, Mitchell & Co.* (4) It cannot be successfully contended that because

(1) (1905) 93 L. T. 174.
(2) (1905) 94 L. T. 198.
(3) L. R. 2 Ex. 340.
(4) [1895] 2 Q. B. 70, 418.

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

Sasebo was geographically within the limits mentioned in the articles a voyage to that port was necessarily an ordinary commercial voyage, for substantially those limits include the whole navigable globe; the facts must be looked at, and they are conclusive, for after leaving Hong Kong the ship was carrying contraband of war to a naval base of one of the belligerents. The plaintiffs were not left on shore at Hong Kong under a certificate of their unfitness or inability to proceed on the voyage within the meaning of s. 158 of the Merchant Shipping Act, 1894, and therefore their right to wages did not terminate at that date.

Secondly, there is no estoppel against the plaintiffs by reason of their conviction at Hong Kong. To operate as an estoppel the proceedings must be between the same parties; but the proceedings at Hong Kong were criminal in their nature and were between the Crown and the plaintiffs, and a judgment in a criminal matter cannot operate as an estoppel in civil proceedings. [On this point they cited Taylor on Evidence (10th ed.), s. 1693; *Gibson* v. *McCarty* (1); *Petrie* v. *Nuttall* (2); *Castrique* v. *Imrie* (3); and COZENS-HARDY L.J. referred to *Justice* v. *Gosling*. (4)]

As to the cross-appeal, the learned judge was wrong in only giving the plaintiffs their wages down to the date of their return to this country. Under s. 134, sub-s. (*a*), of the Merchant Shipping Act, 1894, in the case of foreign-going ships the master is to pay a portion of the wages on account when the seaman lawfully leaves the ship and the remainder within two clear days; or (sub-s. (*b*)), if the seaman consents, the final settlement of wages may be left to a superintendent under regulations of the Board of Trade; or (sub-s. (*c*)), if the wages are not so paid or settled, then, "unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof." The plaintiffs

(1) (1736) Cas. temp. Hardwicke, 311.

(2) (1856) 11 Ex. 569.

(3) (1870) L. R. 4 H. L. 414, at p. 434.

(4) (1852) 12 C B. 39.

are therefore entitled to continuing wages down to the final settlement of their claim, that is the judgment of this Court, there having been no discharge of the men or payment or settlement of wages within the meaning of that section; and they are also entitled to an allowance for the food and maintenance they would have received had they continued on board until the completion of the voyage. They also should be awarded general damages for the breach of the agreement on the defendants' part: *The Justitia* (1); the grounds of that claim being their humiliating treatment at Hong Kong, and the improper refusal to enter in the official log-book a statement under s. 240, sub-s. 4, of the Merchant Shipping Act, 1894, of their conduct, character, and qualifications.

J. A. Hamilton, K.C., in reply.

Cur. adv. vult.

Dec. 21. COLLINS M.R. I have had an opportunity of reading the judgments of my learned brethren, and I entirely agree with them.

COZENS-HARDY L.J. The respondents on this appeal are seamen, who agreed in writing to serve on a vessel on a voyage of not exceeding three years' duration to any ports within the limits of 75 degrees N., and 60 degrees S. latitude, commencing at Glasgow, proceeding thence to Hong Kong via Barry $\frac{\text{and}}{\text{or}}$ any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or continent of Europe as might be required by the master. At the date of the agreement, which was signed at Cardiff by the respondents, war had been declared between Russia and Japan. The cargo with which the vessel was loaded was a cargo of coals. To the knowledge of the seamen coals were, according to the statements of both belligerents, contraband. The seamen did not know that the ultimate destination of the ship by arrangement with the owners was Japan. They first learned this at Hong Kong, and when told by the master, who had not heard it himself till then, that the vessel was going to Sasebo, which is a naval base in Japan, they declined to proceed further on the

(1) (1887) 12 P. D. 145.

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

Cozens-Hardy L.J.

voyage. They were taken before the local marine superintendent, who acts as port magistrate, and were sentenced to prison for ten weeks. They were finally sent back from Hong Kong as distressed seamen to this country, and they brought this action, claiming wages until final settlement and also general damages.

The main question on the appeal is whether the seamen were bound to proceed with the contraband cargo to Sasebo, a place within the limits stated in the agreement. It is not alleged that there is any illegality in a contract to carry contraband to a belligerent port. But it appears from documents published in the *London Gazette* of March 18, 1904, a date prior to the agreement, that the Russian Government declared neutral vessels liable to confiscation if carrying contraband of war to the enemy's port. It is not, in my opinion, necessary to consider whether, according to international law as generally understood, the contraband cargo alone ought to be confiscated, or whether the vessel itself could also be confiscated. It is sufficient to say that the Russian Government asserted, and were prepared to enforce, the latter view.

Now it has been held that a similar agreement before the outbreak of war did not bind a seaman to continue after the outbreak of war a voyage in terms falling within the language of the agreement, but involving the risk of capture and detention, if not of loss of life: *Burton* v. *Pinkerton* (1); *O'Neill* v. *Armstrong, Mitchell & Co.* (2) This conclusion was reached partly on the ground that the war was a new element not in the contemplation of either party when the agreement was signed, but mainly, I think, on the ground that, as matter of construction, the agreement was to serve only on a commercial or mercantile voyage involving perils of the sea, including piratical attacks, but not involving the special and peculiar risks of capture by a belligerent fleet; this latter ground seems to be equally sound, although the agreement may be signed after and with notice of the outbreak of war. The sailors in the present case knew that coal was contraband, but they did not know, until they were informed at Hong Kong, that the coal was to be taken to Japan. If they had been told that the coal

(1) L. R. 2 Exch. 340. (2) [1895] 2 Q. B. 70, 418.

was intended, not for Japan, but for a Russian port then blockaded by the Japanese, and that they were required to run the blockade, I think they would have been entitled to say that the bargain made at Cardiff did not, as matter of construction, extend to such an adventure. And although the danger of carrying a cargo of contraband goods from Hong Kong to Japan was less than the danger of running a blockade, it seems to me that the same principle applies. The voyage from Hong Kong ceased to be an ordinary commercial voyage, such as alone was contemplated by the agreement. The sailors ought to have been told what was the destination of the cargo, which was an ordinary commercial cargo, before they signed on. They might, and probably would, have demanded and obtained higher wages for the increased risk. In my opinion they were acting within their rights in refusing to proceed beyond Hong Kong. This is the view taken by the Divisional Court in *Sibery* v. *Connelly* (1), a case which cannot be distinguished from the present case.

It was argued that the proceedings at Hong Kong, which resulted in a sentence of imprisonment for ten weeks, operated as an estoppel and precluded the sailors from now contending that their conduct at Hong Kong was lawful. But it was pointed out that there could be no estoppel, the criminal proceedings at Hong Kong not being between the same parties as the present civil proceedings in this country, and the contention was abandoned by Mr. Hamilton in his reply.

It follows that, in my opinion, Lawrance J. was right in holding that the sailors were entitled to wages, in which term I include an allowance for maintenance. He gave wages only down to the date when the sailors arrived in England. The cross-appeal claims wages to a later date, and I think the sailors are entitled to wages up to the date of the order of this Court. There has not been any such "final settlement" as is required by s. 134 of the Merchant Shipping Act, 1894, and I can see no sufficient reason for stopping at any date short of the judgment of this Court.

The cross-appeal also claims general damages. In substance these damages are based upon what took place at Hong Kong.

(1) 94 L. T. 198.

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

Cozens-Hardy L.J.

But it is not competent for us to hold that the imprisonment was unlawful, or that any case of malicious prosecution can be established. If I may say so, I regret that we cannot award damages for their sufferings at Hong Kong. It is said that the letter "D," which was put upon their discharge papers at Hong Kong by the magistrate, who thus recorded the master's report, has seriously prejudiced them and rendered it difficult to procure fresh employment. But it was in the discretion of the master under s. 240, sub-s. 4, and s. 129 either to give or to refuse to give what is equivalent to a character to a discharged seaman. By writing "D" he stated that he declined—and in the absence of malice I do not think any claim for damages can be based on the master's refusal—to give a character.

Our attention was directed to many sections of the Merchant Shipping Act, 1894, in addition to the three to which I have referred. But I do not consider it necessary to allude to them, except to say that the statutory requirements contained in ss. 113 and 114 with respect to agreements with seamen (which I assume to have been observed in the present case) do not seem to me to have any bearing upon the true construction and effect of the agreement. In other words, they do not prevent the seamen from asserting that they contracted only for an ordinary mercantile voyage.

The result is that in my opinion the appeal should be dismissed with costs, and the cross-appeal should be allowed with costs, but only to the extent I have indicated. The figures were apparently agreed in the Court below, and I presume there will be no difficulty in agreeing them now.

FARWELL L.J. The defendants' appeal depends for its success or failure on the true construction of the contract of December 5, 1904, between the shipowners and the seamen, and as that contract is in common form the case is of considerable importance. At the date on which the contract was executed war between Russia and Japan had been raging for several months, and His Majesty's Secretary of State for Foreign Affairs had in March and April, 1904, given public notice in the *London Gazette* (i.) that the Emperor of Russia regarded coal as contraband

of war, and (ii.) that ships carrying contraband of war to Japanese ports would be seized and condemned. Under these circumstances the seamen (whom I assume to have been aware that coal was contraband of war) signed on for a voyage of not exceeding three years' duration to any ports or places within 75 degrees N. and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Hong Kong $\frac{\text{and}}{\text{or}}$ any other ports within the said degrees of latitude (which amount in effect to the whole eastern hemisphere, and therefore include the whole seat of war and the ports there of the two belligerent powers), and to end at such port in the United Kingdom or the continent of Europe within home trade limits as might be required by the master. The question is whether, on arriving at Hong Kong, the men could lawfully refuse to proceed with their cargo of coal to Sasebo, a Japanese port. In my opinion this must depend on the construction of the contract; no new circumstances had arisen which could justify them in refusing to carry out their bargain if they had in fact made it—e.g., if the destination had been stated in the contract to be Sasebo. I can see no ground upon which the men could have refused to go there, for it is well settled that the carrying of contraband in time of war between two belligerents, both of whom are at peace with this country, is legitimate trading, although the trader runs the risk of capture and of the condemnation of the contraband stores, and in many (if not all) cases of his ship also: see *Ex parte Chavasse*, *In re Grazebrook* (1); *The Helen* (2); Sir G. Lushington's Naval Prize Law; Wheaton on International Law, 4th ed. p. 678; Hall on International Law, 5th ed. p. 693. But these risks, and especially the risk of condemnation of the ship, which necessarily would put an end to the contract of service on board her, with the corresponding advantage of being conveyed home to the United Kingdom or Europe within home trade limits, are in my opinion altogether outside the ordinary perils of shipwreck, pirates, and the like which the seamen necessarily undertake: such perils are the usual perils of peaceful commerce; the peril of capture by ships of war and loss of ship is an unusual and additional peril arising out of a

(1) 4 D. J. & S. 655, at pp. 659-60. (2) (1865) L. R. 1 Adm. & Ecc. 1.

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

Farwell L.J.

state of war between States friendly to our country—a peril, too, which in this case might entail great hardships on the seamen, as was the case in *Austin Friars Steam Shipping Co.* v. *Strack* (1), where the men had to get home across Siberia. Further, the appellants' argument is pressed to this extent, and does, in my opinion, logically lead to this—that the seamen would be bound, if ordered, to attempt to run the blockade of a closely invested harbour and to incur all the dangers of wounds and death incident to such an adventure.

In this case we have to construe a contract to sail in the first instance to a named neutral port, many miles from the scene of war, followed by general words embracing ports within an area wide enough to include the ports of the belligerent powers, but wide enough also to give ample scope for successful voyages elsewhere. If war had broken out between this country and Russia before the contract was entered into, I apprehend that the Court would have had no difficulty in construing the contract so as to restrict the generality of the words by excluding Russian ports in order to give effect to the paramount intent of the parties, viz., to engage in lawful trading. It is the same principle, although its application is not so obviously necessary, that leads the Court to construe the general words so as to limit them by the paramount intention to engage for a peaceful voyage with ordinary commercial risks only—verba intentioni servire debent. So, too, if the contract had been made before the war, and had been to sail to Sasebo, it might well have been construed as subject to an implied condition that the seamen should not be called on to undertake anything more than the ordinary risks of commercial adventures. This is in my opinion the ground of the decision in *Burton* v. *Pinkerton* (2), where Kelly C.B., says that "the contract with the plaintiff was to employ him for twelve months on board this vessel, free from any other perils than such as were incidental to a voyage for ordinary commercial purposes," the contract being for a voyage to Rio or any port or ports over a very large area, and containing no express exceptions of any sort. *O'Neill* v. *Armstrong, Mitchell & Co.* (3) was a

(1) [1905] 2 K. B. 315. (2) L. R. 2 Ex. 340, at p. 346.
(3) [1895] 2 Q. B. 418, at p. 422.

stronger case, because the ship was a warship belonging to Japan and war was declared by Japan against China during the voyage for which the plaintiff signed on. The plaintiff was held justified in leaving the ship at Aden, and was held entitled to his whole wages because, as A. L. Smith L.J. put it, "by the conversion of the voyage by the Japanese Government from one with the risks incident to peace to a voyage with those incident to war, the peace adventure had become frustrated and put an end to."

The principle to which I have referred above is applicable to all contracts, but in the present case there is the additional circumstance that the contract is one between shipowner and seamen, a class of men whom for nearly two centuries the Courts and the Legislature have felt the necessity of protecting. Lord Stowell describes them in *The Minerva* (1) as "notoriously and proverbially reckless and improvident . . . . almost ready to sign any instrument that may be proposed to them, and on all accounts requiring protection even against themselves"; and an Act was passed in 1729 (2 Geo. 2, c. 36) enforcing the execution of written contracts and requiring to be stated as two necessary particulars the extent of the voyage and the rate of wages during its continuance, an enactment which has now expanded into s. 114 of the Merchant Shipping Act, 1894. Lord Stowell, in *The Minerva* (1), had to deal with a contract under the Act of George II. containing the words "from London to New South Wales and India or elsewhere and to return to a port in Europe"; and he held (2) that the words "or elsewhere" must receive a reasonable construction . . . . conformable to the necessities of commerce"; and he treats (3), as quite outside the contract, a voyage "to New Zealand, where not a man ventures to land, for fear of being made a meal's meat of by the cannibal inhabitants, as they are represented to be"; and he says (4) that the contract must receive "such a limitation as will not by any means privilege these wild and eccentric rambles, which the captain has thought proper to take, upon a voyage rather of experiment and discovery, than of commerce."

(1) (1825) 1 Hagg. Adm. 347, at p. 355.
(2) Ibid. at p. 361.
(3) Ibid. at p. 364.
(4) Ibid. at p. 367.

C. A.
1906
CAINE
v.
PALACE
STEAM
SHIPPING
COMPANY.
Farwell L.J

In *The George Home* (1) Lord Stowell says: "The mariners' contract describes the voyage for which they undertake, 'to be from the port of London to Batavia, to any ports and places, the East India seas or elsewhere, and until her final arrival at any port or ports in Europe.' This is certainly a most sweeping description of the ports of unlivery, for it comprehends every port situated between the southern and northern extremities of Europe. It would apply with equal truth to Corfu and Archangel; it could not in either case be charged as a misrepresentation. But, though a true description in that sense, and, therefore, not liable to a charge of absolute deception, yet it by no means answers the beneficial purposes for which the law makes the demand in favour of the mariner, that the voyage for which he contracts shall be made known to him. The beneficial purposes for which the law makes such a requisition in his favour are, that he may know as exactly as can be described, for what probable space of time he surrenders himself, his services, his interest, his domestic comforts, his health and personal convenience. These and other considerations are to influence his decision. With respect to the disposal of himself, he has a right to be informed as far as competent accuracy can be applied to the subject; and it is unnecessary to add that a description, which extends over one entire quarter of the globe, without any more particular limitation, though geographically true, affords nothing that can be considered as bearing the shape or colour of such accuracy." These observations appear to me to apply to a case like the present. If the shipowner requires the seamen to run risks to life and limb and health and comfort greater than those necessarily incident to the usual life of seamen engaged in peaceful commerce, he must state it clearly in the contract, for the Court will not deduce it from ambiguous or general words. The contract in the present case fails to do this, and on its true construction it did not oblige the seamen to sail with coal to Sasebo.

Reference was made to s. 114 of the Merchant Shipping Act, 1894, but this does not assist the appellants, assuming that they have complied with it. There is nothing in it to relieve them

(1) (1825) 1 Hagg. Adm. 370, at p. 375.

from the duty of stating explicitly in the contracts any extraordinary risks that they expect the seamen to run. The section is a reproduction of part of s. 149 of the Act of 1854 and s. 7 of the Act of 1873; the Act of 1854 was in force when *Burton* v. *Pinkerton* (1) was decided, and it was not suggested that s. 149 of that Act expressed the whole extent of the shipowner's duty, and I can see nothing in the words added by the present Act from the Act of 1873 which would have that effect.

Another point was raised by the appellants in the Court below—namely, that the conviction of the men by the magistrate at Hong Kong estopped them from raising their present contention, but this was properly given up by Mr. Hamilton in this Court. It is well settled that a conviction is no estoppel in a civil action: see *Castrique* v. *Imrie* (2); *Petrie* v. *Nuttall* (3); Taylor on Evidence, 10th ed. s. 1693. Estoppels must be mutual; but the litigation here is between shipowners and seamen, in the criminal proceeding at Hong Kong it was between the King and the prisoners. I am therefore of opinion that the defendants' appeal fails and must be dismissed with costs.

The plaintiffs have a cross-appeal for their wages and maintenance up to final settlement within s. 134 (*c*) of the Merchant Shipping Act, 1894, and for damages for the hardships and indignities suffered by them in Hong Kong, and for the loss of character entailed by the refusal of the master to give any opinion on the conduct, character, and qualifications of the seamen under s. 129 of the Act of 1894. The claim for damages for malicious prosecution was abandoned in the Court below. Lawrance J. gave the seamen wages and maintenance up to the date of their return to England only, and I am unable to find any reason for this; the Act provides in s. 134, sub-s. 1 (*c*), "In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the

(1) L. R. 2 Exch. 340. (2) L. R. 4 H. L. 414, at p. 434.
(3) 11 Ex. 569.

C. A. 1906

CAINE v. PALACE STEAM SHIPPING COMPANY.

Farwell L.J.

time of the final settlement thereof." Lawrance J. has held, and we agree with him, that the non-payment of the seamen's wages is due to the wrongful act of the master in putting them ashore at Hong Kong and leaving them there. The fact that they were imprisoned immediately after they were put on shore, and therefore could not serve on board, is immaterial, because it happened after the captain had wrongfully determined the contract of service; the seamen did not carry out their real contract of service because the captain would not let them, not because they were imprisoned, and we are therefore in no way hampered by the fact of their imprisonment. If the captain had put the men ashore on an island inhabited by savages, he could not set up in defence to a claim under this section the fact that the savages had enslaved the men and therefore they could not have worked for him. The result is that there never has been any settlement within s. 134 down to the present time, and the seamen are entitled to the admitted daily sums down to to-day.

I cannot, however, see that they are entitled to any further sum for damages: they admit that they can get none for malicious prosecution, because the conviction stands, and the indignities and hardships were incident to the imprisonment and were the acts of the local police and prison authorities.

I have had some doubt as to the certificate and its indorsed "D," but I understand that all parties are willing that this shall be rectified so far as is possible, and that no money claim is now pressed in respect of this. The cross-appeal should therefore be allowed to the extent of giving wages and maintenance up to to-day, and the defendants to the action should pay the costs of appeal and cross-appeal.

Appeal dismissed: Cross-appeal allowed in part.

Solicitors for plaintiffs: *Chivers & Co.*
Solicitors for defendants: *Botterell & Roche.*

W. J. B.

[IN THE COMMERCIAL COURT.]

1907
Jan. 16, 17.

YUILL & CO. *v.* SCOTT ROBSON.

Sale of Goods—Contract for Sale of Cattle at Price including Cost, Freight, and Insurance—Contract by Seller to insure Cattle "against all Risks" —Warranty in Policy against "Capture, Seizure and Detention"— Slaughter of Cattle in consequence of Government Prohibition against Landing—Liability of Seller.

Cattle were bought at Buenos Ayres, at a price including cost, freight, and insurance, for shipment to Durban; by the contract of sale the seller was to insure the cattle "against all risks." The seller obtained, and handed to the buyer, a policy of insurance which was an ordinary "all risks" Lloyd's policy, but which, in accordance with the usual practice among insurance brokers and underwriters with regard to such policies, contained a warranty against "capture, seizure and detention, and the consequences thereof." Disease broke out among the cattle on the voyage, and on arrival at Durban the authorities forbade their landing, and the cattle were consequently slaughtered. The underwriters having refused to pay upon the policy, except in regard to risks not affected by the warranty, the buyer brought an action against the seller to recover damages for breach of contract to insure the cattle "against all risks":—

Held, that the contract, being a contract between buyer and seller, contemplated an insurance of the cattle against all risks whatsoever, and was not satisfied by the procuring of a policy which, as between insurance brokers and underwriters, would be considered an "all risks" policy, and that the seller was therefore liable to the buyer for the damage arising in consequence of the cattle not being allowed to land.

Action tried in the Commercial Court by Channell J. without a jury.

The action was brought to recover damages for breach of a stipulation in a contract for the sale of bullocks under the following circumstances. The contract was contained in two letters, dated April 4, 1903, written at Buenos Ayres by one Miskin, the plaintiffs' agent, and the defendant respectively, by which the defendant agreed to sell, and the plaintiff to buy, 250 bullocks at 17*l.* a head, to include cost, freight, and insurance, for shipment by the steamer *Abbey Holme* to Durban; the contract contained a stipulation that the bullocks were to be insured by the defendant "against all risks." The bullocks were duly shipped by the defendant and the price paid

1907

YUILL & CO. v. SCOTT ROBSON.

by the plaintiffs. On the voyage of the *Abbey Holme* to Durban foot-and-mouth disease broke out among the cattle, with the result that on arrival at Durban the authorities forbade the landing of the cattle, which were consequently slaughtered and their carcases sold at 5*l.* a head. The plaintiffs thereupon gave notice of abandonment to the underwriters, alleging a constructive total loss of the bullocks, but the underwriters refused to pay the plaintiffs' claim, amounting to 3829*l.*, on the ground that the policy taken out by the defendant for the plaintiffs under their contract contained an exception of losses occasioned by "capture, seizure and detention and the consequences thereof."

An action by the plaintiffs on the policy was compromised for 990*l.* (representing principally the value of cattle which had died on the voyage), and the plaintiffs sought in the present action to recover the difference of 2839*l.*, with the costs of the action against the underwriters, making a total of 2986*l.*, as damages for the breach by the defendant of his undertaking to procure for the plaintiffs an insurance of the bullocks against all risks. The defendant contended that he had procured a policy which satisfied the terms of the contract, and which had been accepted by the plaintiffs and by their agent to whom it was delivered. The policy procured by the defendant was an ordinary Lloyd's policy with special clauses attached. The clause in controversy was printed in italics, but by a note was to be construed as if it had been written, and was in these terms: "Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." Certain typewritten clauses, called "All risks live stock clauses," were attached to the policy, of which the important one ran: "To cover mortality, jettison, washing overboard, and risks of every kind from time of arrival at wharf and until delivered to consignees, but free of all claim for particular average and depreciation of animals which walk ashore (or after release from the slings) at destination, unless caused by or in consequence of the vessel craft or cargo being stranded, sunk, burnt, or on fire

or by collision or by disablement of steamer. . . . ." The defendant further pleaded that, in the absence of special instructions, it was a usual and well-known custom to include in marine policies against all risks the warranty "free of capture, seizure or detention," and that the custom was, or ought to have been, well known to the plaintiffs. Evidence was given on behalf of the defendant by several underwriters and insurance brokers to prove the custom with regard to a policy "against all risks," and to shew that the usual course was to effect a separate insurance against the risk of the landing of cattle being prohibited by the authorities of the country or place to which they were consigned.

Scrutton, K.C., and *F. D. Mackinnon*, for the plaintiffs.

J. A. Hamilton, K.C., and *Lewis Noad*, for the defendant.

[Having regard to the point decided, it is thought unnecessary to set out the arguments which are stated clearly in the judgment. The following cases were cited: *Miller* v. *Law Accident Insurance Co.* (1); *Schloss Brothers* v. *Stevens* (2); *St. Paul Fire and Marine Insurance Co.* v. *Morice.* (3)]

CHANNELL J. In this case I have to determine whether the defendant has committed a breach of his agreement with the plaintiffs to procure an insurance of the bullocks sold by him "against all risks." A great deal of evidence has been given by gentlemen of experience in the insurance world to the effect that the warranty against capture, seizure and detention is always inserted in a policy against all risks, unless special instructions to the contrary are given, and it is obviously a convenient business practice, and probably well known to all who are conversant with the business of insurance. We are not, however, dealing in this action with a contract of insurance, but with a contract for the sale of bullocks for shipment, at a price including cost, freight and insurance, one provision of the contract being that the bullocks were to be insured by the defendant on the voyage to Durban "against all risks." In my

(1) [1903] 1 K. B. 712. (2) [1906] 2 K. B. 665.
(3) (1906) 11 Com. Cas. 153.

1907

YUILL & Co. v. SCOTT ROBSON.

Channell J.

opinion the contract contemplates insurance against all risks whatever as between buyer and seller, and the case is not to be determined by the meaning of the expression "against all risks" as between insurance brokers and underwriters. No doubt the evidence clearly shews that an insurance broker would expect a policy against all risks to contain the warranty against capture, seizure and detention, but the question as between the buyer and seller of goods is a very different one indeed, and I very much doubt the admissibility of the evidence given on behalf of the defendant. I think that in the present case the expression covers insurance against a risk so obvious to parties buying and selling live cattle for shipment as that of the cattle being prevented from landing at their destination by reason of the apprehension of the authorities of the importation of disease. Such a prohibition is very usual, and the risk would naturally be present to the minds of persons in the position of the plaintiffs and the defendant. The plaintiffs obviously intended that the contract should ensure their getting a policy which would cover the risk of prohibition of landing, but they have only got from the defendant a policy which, according to the decision in *Miller* v. *Law Accident Insurance Co.* (1), does not cover that particular risk. The policy was not a compliance with the requirement of the contract, although both parties seem to have thought, and under the particular circumstances not unnaturally, that it did comply with it. The defendants ask me to construe the provision in the contract of sale as to insurance against all risks as if it were a contract to procure a policy of the kind known at Lloyds as an "all risks policy," so that it would be satisfied by procuring a policy not really against all risks, but one so called. I see nothing in the contract to justify me in so construing it.

It has been suggested on behalf of the defendant that the plaintiffs are estopped from setting up the defence, because Miskin, the plaintiffs' agent, at an interview with the defendant, asked to see and was shewn a form of policy, and on being told by the defendant, in answer to a question put by Miskin, that the policy covered foot-and-mouth disease, expressed himself satisfied with the form of policy. It was said that if

(1) [1903] 1 K. B. 712.

Miskin, after seeing the policy, had objected to it as not being a compliance with the terms of the contract of sale, another insurance might have been effected which would have covered the particular risk. If the policy had been tendered by the defendant to Miskin for the express purpose of getting his consent to it, and the consent so given had been acted upon, I think it possible that there might have been an estoppel against the plaintiffs; but that is not the effect of the evidence given. The evidence comes to no more than this, that each party thought the policy was all right, and, having regard to the date when *Miller* v. *Law Accident Insurance Co.* (1) was decided, they might well think so, but an estoppel cannot arise out of their mutual understanding to that effect. For these reasons I must give judgment for the plaintiffs for the amount claimed and costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for defendant: *W. A. Crump & Son.*

W. J. B.

(1) [1903] 1 K. B. 712.

1906

Oct. 31.

1907

Jan. 28.

ROBSON *v.* BIGGAR.

Landlord and Tenant—Distress—Bailiff—Costs and Charges—Agreement for Extra Remuneration—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *ss.* 1, 2 *—Law of Distress Amendment Act*, 1888 (51 *&* 52 *Vict. c.* 21).

A certificated bailiff who levies a distress for arrears of rent for an amount not exceeding 20*l.* is not prohibited by the Distress (Costs) Act, 1817, or the Law of Distress Amendment Act, 1888, or the rules thereunder, from making a special agreement with the landlord for extra remuneration beyond the costs and charges allowed under those acts.

So *held* by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting).

Case stated by justices for the county of Northumberland.

The respondent had been summoned to answer a complaint made by the appellant under s. 1 (1) of the Distress (Costs) Act, 1817, which charged that the respondent, being employed by the appellant to make a distress upon the goods and chattels of one Cowen for a sum of 17*l.*, being arrears of rent due by Cowen to the appellant, unlawfully retained certain charges exceeding those allowed by statute, viz., a sum of 17*s.* for alleged commission.

At the hearing before the justices the following facts were proved or admitted. The appellant, acting through a house agent named Hall, had employed the respondent, who was a duly certificated bailiff, to levy a distress for the sum of 17*l.*, the amount of arrears of rent due to the appellant. A printed form of warrant or authority to distrain was signed by the appellant, in which the following words appeared in print: "I also consent to your deducting 5 per cent. as commission over and above the statutory costs allowed on the amount recovered." The appellant said that, when the warrant was brought to her by her agent for signature, she did not read it over before signing it, and was not aware that such a consent was incorporated in it. After making the distress, the respondent handed to the husband of the appellant the sum of 16*l.* 3*s.*, as the amount recovered for the 17*l.* arrears of rent, retaining the sum of 17*s.* commission deducted

(1) Apparently this should be s. 2. See post, p. 691.

by him in accordance with the appellant's consent contained in the warrant.

It was contended for the appellant that the respondent, notwithstanding the alleged consent, was not entitled to deduct the commission, but was limited to the charges fixed by the Distress (Costs) Act, 1817, and the Law of Distress Amendment Act, 1888, and the rules thereunder, and Appendix II., Scale 2, to such rules, the 5 per cent. commission not being a charge authorized by the Act.

It was contended by the respondent that his remuneration was not limited to the charges fixed by the statute, inasmuch as the appellant had agreed to the deduction of 5 per cent. commission and had contracted herself out of the provisions of the Acts and rules.

The justices dismissed the complaint, and the question for the Court was whether their dismissal was right in law.

Forster Boulton, for the appellant. A bailiff has no authority to insert a commission clause in a printed form of warrant of distress provided by himself. By s. 1 of the Distress (Costs) Act, 1817, a bailiff levying a distress for rent, when the sum due does not exceed 20*l*., may not have, take, or receive out of the produce of the goods distrained upon, or from the tenant, or from the landlord, any other or more costs and charges than those fixed and set forth in the schedule; those charges, with slight variations, are the same as those contained in Appendix II., Scale 2, of the rules under the Law of Distress Amendment Act, 1888, and rr. 15 and 16 provide that no one is entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto, other than those authorized by the table in Appendix II. Neither the schedule to the Act of 1817, nor Appendix II. of the Rules of 1888, allows any charge for commission on the amount recovered.

[LORD ALVERSTONE C.J. The special case says that the respondent was summoned under s. 1, but that section does not create any offence.]

By s. 2 a person complained of can be summoned before the justices and ordered to pay the person aggrieved treble the

1906

ROBSON v. BIGGAR.

moneys unlawfully taken, and the proceedings were in effect taken under the two sections. The provisions of the Act are imperative, and where a transaction is forbidden by statute the parties cannot contract themselves out of it. The imposition by the Legislature of a penalty on any specific act or omission is prima facie equivalent to an express prohibition: Pollock on Contracts, 7th ed. p. 293.

The respondent did not appear. (1)

Cur. adv. vult.

1907. Jan. 28. The following written judgments were delivered:—

LORD ALVERSTONE C.J. In this case a complaint was brought by the appellant Elizabeth Robson against the respondent John Biggar, under 57 Geo. 3, c. 93, s. 2, charging that he, the respondent, on April 10, 1906, being employed to make a distress for rent, retained and took from the appellant charges exceeding the amount of costs and charges allowed by the statute. The appellant had signed an agreement with the respondent to pay him commission of 5 per cent. over and above the statutory costs, and in accordance with that agreement the respondent deducted 17*s.*, the amount being 5 per cent. commission on 17*l.*, the produce of the goods levied. The question is whether or not the deduction was unlawful having regard to the provisions of the statutes of 57 Geo. 3, c. 93, and 51 & 52 Vict. c. 21.

The Act of Geo. 3, which was passed, as the preamble shews, to prevent excessive charges being made in the course of a distress to the great oppression of poor tenants and others, provided that no person making any distress for rent under 20*l.* should have, take, or receive out of the produce of the goods distrained, or from the landlord, any more costs or charges than those fixed in the schedule to the Act. Sect. 2, under which the proceedings

(1) The appeal was heard on October 31, 1906, when the Court intimated that, in view of the importance of the question, it was desirable it should be argued on behalf of the respondent, and adjourned the further hearing for a week in order that the respondent might be communicated with to that effect. On the adjourned day the respondent was again not represented, and judgment was reserved without further argument.

1907

ROBSON v. BIGGAR.

Lord Alverstone C.J.

were taken, empowered a justice to order treble the amount of the excess charges to be paid by the person offending with costs. The statute 51 & 52 Vict. c. 21 varied the scale, and, by rules made thereunder, provided (clause 15) that no person shall be entitled to any fees, charges, or expenses for levying distress other than those specified in the schedule to the rules. The question for our determination is whether, having regard to these provisions, the agreement entered into between the appellant and respondent was unlawful, so that it was compulsory upon the justices to make an order against the respondent in accordance with s. 2 of the Act.

The statute 57 Geo. 3, c. 93, is in the nature of a penal statute, and must be construed strictly. In my judgment it was passed in order to prevent excessive fees being levied as such, either against the landlord or the tenant, and the words "shall have take or receive out of the produce . . . . or from the tenant distrained on or from the landlord" apply to such charges, and are not sufficient to render illegal a special agreement for extra remuneration, such as in this case was entered into between the parties. There are no words prohibiting contracts made contrary to the provisions of the statute, and therefore the question is, as stated in Pollock on Contracts, 7th ed. p. 296, whether the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed. In so far as the fees charged as of right by bailiffs against landlords or tenants, whether out of the proceeds or not, are concerned, the statute was undoubtedly passed for their protection, but it seems to me not to be concerned with special bargains made between the parties, and I do not think the words are sufficiently strong to render a special contract illegal or one which cannot be enforced by law, so as to make it imperative upon the justices to make an order fining the respondent under the section in question. I am therefore of opinion that this appeal should be dismissed.

RIDLEY J. I have had the opportunity of reading the judgment of my Lord, and I agree with the conclusion at which he arrives in this case.

1907

ROBSON v. BIGGAR.

Ridley J.

It was contended that, as 57 Geo. 3, c. 93, prohibits any person making a distress for under 20*l.* from having or recovering out of the produce of the goods distrained, or from the landlord, any more costs or charges than those fixed in the schedule, and gives justices power to order any person offending to pay treble the amount of excess charges, therefore the agreement by which in this case the landlord consented to the bailiff receiving 5 per cent. on the amount levied, in addition to his charges, was illegal and void.

There seems to be no doubt that both landlord and tenant come within the protection given by this statute. But in every case where the statute law enacts a prohibition, it has to be determined by the Courts whether the matter in question is rendered so far illegal that it can or cannot be made the subject of agreement; see Leake on Contracts, 5th ed., part iii., c. 4. There may be express words prohibiting such an agreement; or in their absence the prohibition may be inferred from the proper construction and scope of the statute. In the present instance there are no words which prohibit an agreement such as that now in question; and when we turn to the construction of the statute, it appears to me to have been directed against "the making of excessive charges to the oppression of poor tenants and others," and with that object to have prohibited the taking any more costs or charges than those set out in the schedule. The words "oppression" and "charges" mean oppression by the taking of costs and charges which neither tenant nor landlord can decline to pay. Those are fixed in a schedule; but I do not see how either tenant or landlord can be "oppressed" on being asked to pay that which they have expressly consented to pay; nor, indeed, do I think that this 5 per cent. commission, although it is a "charge" within the general meaning of that word, is a "charge" as that word is used in the statute in question. For these reasons I think it was not imperative on the justices to make the order.

DARLING J. I have had the advantage of reading the judgment in this case prepared by my Lord, and I regret that I cannot

agree in the conclusions arrived at by him and my brother Ridley.

The statute 57 Geo. 3, c. 93, distinctly states that persons acting as brokers "have of late made excessive charges, to the great oppression of poor tenants and others, and it is expedient to check such practices." From this I deduce that it was intended to protect landlords as well as tenants by means of the limited list of fees afterwards provided. Then the statute enacts that for the doing of a variety of things—some of them for the exclusive benefit of the landlord—no one in the position of the respondent "shall have, take, or receive out of the produce of the goods and chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever," any more than the statutory charges. It appears, therefore, that the landlord is by name amongst those whom the statute was intended to protect, and the protection given is not limited by the extent of the landlord's or the tenant's interest in the produce of the goods seized. The broker is not to "have, take, or receive from the landlord" more than the fees allowed, and this is laid down in a statute expressly framed "to check such practices" as the making of "excessive charges." I come to the conclusion that the Legislature was in earnest in trying to end the mischief of making inordinate charges, and s. 2 of the Act helps to satisfy me of this. That the end desired would have been attained if the bailiff were still left free to make what bargain he could I cannot believe. If he might bargain with the landlord, he might do so with the tenant—that is, with one who was in too bad a position to be able to resist exorbitant demands.

It seems to me worthy of notice that the Act of 1817 only applies in cases where not more than the sum of 20*l.* is due. The Legislature would appear to have had in view somewhat small transactions, in respect to which the fees allowed might well be amply sufficient, whilst as to larger, and possibly more complicated, levies the bailiffs were left to make their own terms. Were the fees allowed by the statute not to be regarded as the obligatory maximum, it seems to me that the Act would amount to a mere recommendation to brokers to be moderate in their

1907

ROBSON v. BIGGAR.

demands—surely a lame conclusion to follow so grandiose a preamble.

Appeal dismissed.

Solicitor for appellant: *R. Scott Hopper, Whitley Bay, Northumberland.*

W. J. B.

1907

Jan. 16.

THE KING *v.* THE GOVERNOR OF BRIXTON PRISON. *Ex parte* PERCIVAL.

Jurisdiction—Fugitive Offender—Committal by Magistrate for return to Colony—Evidence of Crime punishable in Colony by Imprisonment with Hard Labour for Twelve Months or more—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *s.* 9.

In order that a magistrate may have jurisdiction under s. 9 of the Fugitive Offenders Act, 1881, to commit a fugitive offender for return to a Colony, it is necessary that there should be evidence before him that the offender has committed an offence punishable according to the law of the Colony in which it is alleged to have been committed by imprisonment with hard labour for a term of twelve months or more.

RULE nisi granted upon an application on behalf of the defendant Alexander Holtzendorff Percival calling upon the governor of His Majesty's prison at Brixton to shew cause why a writ of habeas corpus should not issue directed to him to have the body of the applicant before this Court immediately, to undergo and receive all and singular such matters and things as this Court should then and there consider of concerning him in this behalf.

The applicant Percival had been committed to the custody of the governor of Brixton Prison under a warrant of committal granted by Mr. Marsham, a metropolitan magistrate, which, so far as material, was as follows:—

"Be it remembered, that on this tenth day of December in the year of our Lord one thousand nine hundred and six Alexander Holtzendorff Percival (hereinafter called the defendant) is brought before me one of the magistrates of the metropolitan police courts, sitting at the police court in Bow Street, within

the Metropolitan Police District, under three warrants issued by lawful authority in the British Colony of Victoria and indorsed in the United Kingdom, as provided by the Fugitive Offenders Act, 1881 (1), to shew cause why he should not be returned to

(1) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 5: ". . . . If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return . . . ."

Sect. 9: "This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanor, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment . . . . This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies."

Crimes Act, 1890 (54 Vict. No. 1079), of Victoria, s. 139: "Whosoever being a clerk or servant or being employed for the purpose or in the capacity of a clerk or servant shall steal any chattel money or valuable security belonging to or in the possession or power of his master or employer shall be guilty of felony; and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding ten years."

Sect. 140: "Whosoever being a clerk or servant or being employed for the purpose or in the capacity of a clerk or servant shall fraudulently embezzle any chattel money or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel money or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk servant or other person so employed; and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding ten years."

Sect. 146: "Whosoever having been entrusted either solely or jointly with any other person as a banker merchant broker attorney or other agent with any money or security for the payment of money with any direction in writing to

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL, *Ex parte.*

the said Colony in manner provided by the said Act, on the ground of his being accused of the commission of the following

apply pay or deliver such money or security or any part thereof respectively or the proceeds or any part of the proceeds of such security for any purpose or to any person specified in such direction, shall in violation of good faith and contrary to the terms of such direction in any wise convert to his own use or benefit or the use or benefit of any person other than the person by whom he shall have been so entrusted such money security or proceeds or any part thereof respectively; and whosoever, having been entrusted either solely or jointly with any other person as a banker merchant broker attorney or other agent with any chattel or valuable security or any power of attorney for the sale or transfer of any share or interest in any public stock or fund whether of the United Kingdom or any part thereof or of Victoria or any other British Colony or of any foreign State or in any stock or fund in any body corporate company or society for safe custody or for any special purpose without any authority to sell negotiate transfer or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel security or power of attorney shall have been entrusted to him sell negotiate transfer pledge or in any manner convert to his own use or benefit or the use or benefit of any person other than the person by whom he shall have been so entrusted such chattel or security or the proceeds of the same or any part thereof or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof, shall be guilty of a misdemeanour; and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding seven years. But nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever or any mortgagee of any property real or personal in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker merchant broker attorney or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security according to the tenor and effect thereof in such manner as he might have done if this Act had not been passed nor from selling transferring or otherwise disposing of any securities or effects in his possession upon which he shall have any lien claim or demand entitling him by law so to do, unless such sale transfer or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien claim or demand."

Crimes Act, 1890, Amendment Act, 1896 (60 Vict. No. 1478), of Victoria, s. 2: "Whosoever having as the clerk servant or agent of any person or as a bailee received or obtained any property on terms express or implied and whether such terms be written or verbal requiring him to account for deliver or pay such property or the proceeds thereof or any part of such proceeds to his master employer principal or bailor

offences within the jurisdiction of the said Colony (each of) the said offences being punishable in the said Colony by imprisonment with hard labour for a term of twelve months or more, or by some greater punishment, that is to say: the following three offences of larceny:—

"1. For that he on the 4th day of March, 1898, did feloniously steal the sum of one hundred pounds of the money of Horace Finn Tucker and others.

"2. For that he on the 27th day of March, 1899, did feloniously steal the sum of two hundred pounds of the money of Horace Finn Tucker and others.

"3. For that he on the 21st day of December, 1900, did feloniously steal a certain valuable security other than a document of title to lands to wit a cheque for the sum of fifty-six pounds fourteen shillings the property of the Trinity College Council and forasmuch as no sufficient cause has been shewn to me why he should not be returned to the said Colony in pursuance of the said Act there to be dealt with in due course of law.

"This is therefore to command you the said constables in His Majesty's name to forthwith convey and deliver the body of the said defendant into the custody of the said keeper of His Majesty's prison at Brixton and you the said keeper to receive the said defendant into your custody and him there safely to keep until he is thence delivered pursuant to the provisions of the said Fugitive Offenders Act, for which this shall be your warrant."

The applicant had been admitted to bail pending the decision

(as the case may be) or to any other person though not requiring him to deliver over or pay in specie the identical property received or obtained fraudulently converts such property or proceeds to his own use or fraudulently omits to account for deliver or pay such property or any part thereof or to account for deliver or pay such proceeds or any part thereof which he was required to account for deliver or pay as aforesaid shall be deemed to have feloniously stolen the same from his master employer principal or bailor or other person to whom the said accounting delivering or payment ought to have been made, and being convicted thereof shall be liable to be imprisoned for any term not exceeding ten years."

Sect. 4: "In section one hundred and forty-six of the principal Act the words 'in writing' occurring after 'direction' shall be and the same are hereby repealed."

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL, *Ex parte.*

of this case. The grounds upon which the rule nisi had been obtained were (inter alia)—(1.) that there was no evidence to support the charges of larceny in the Victorian warrant; (2.) that there was no evidence to support the committal of the magistrate.

The Victorian information and warrant in respect of the larceny of the sum of 100*l.* was as follows :—

"Justices Act, 1890—Second Schedule, Form III.

"Information for an offence and warrants to apprehend.

"In the Central Bailiwick,
State of Victoria.

"Patrick McManamny, sergeant of police, Informant.
"Alexander Holtzendorff Percival, late of Melbourne, in the said State, Defendant.

"The information of Patrick McManamny of Melbourne in the State of Victoria, sergeant of police, who saith that the said Alexander Holtzendorff Percival on the 4th day of March A.D. 1898 at Melbourne in the said Bailiwick and State did feloniously steal take and carry away certain money to wit the sum of 100*l.* of the money of Horace Finn Tucker and others contrary to the Statute such offence being punishable in the State of Victoria by imprisonment with hard labour for a term of twelve months or more.

(Signed) "P. McManamny,
Informant."

"To Frederick Augustus Hunt, a member of the Police Force of the State of Victoria, and to all other members of the said Force.

"Whereas the above information has this day been laid and sworn by the above-named Patrick McManamny before me, one of His Majesty's Justices of the Peace in and for the Central Bailiwick of the said State: These are therefore to command you in His Majesty's name forthwith to apprehend the above-named Alexander Holtzendorff Percival and bring him before me or some other of His Majesty's Justices of the Peace in and for the

said Bailiwick to answer to the said information, and to be further dealt with according to law.

"Dated at Melbourne the 26th day of July, 1906.

(Signed) "J. A. Panton

(A Police Magistrate and Justice of the Peace for the Central and all Bailiwicks of the State of Victoria and as such having authority to issue warrants in Victoria for the apprehension of persons accused of offences and to commit such persons for trial)."

The Victorian information and warrant in respect of the larceny of the sum of 200*l.* and the cheque for 56*l.* 14*s.* was in each case in the same form as that above set out with regard to the larceny of the sum of 100*l.* The following facts appeared from the depositions taken before the magistrates in Melbourne and at Bow Street: The applicant was charged under the Fugitive Offenders Act, 1881, with the offence of larceny in the Colony of Victoria. The return of the applicant was demanded by the State of Victoria upon the three informations and warrants dated July, 1906, which respectively charged him with the larceny of the two sums of 100*l.* and 200*l.* and of the cheque for 56*l.* 14*s.* belonging to Trinity College, Melbourne. All the offences were alleged to have been committed over five years ago, when the applicant was hon. treasurer of the college and a member of the college council. The council had caused a warrant to be issued against the accused in August, 1901, but no effort had been made to obtain his return till April, 1906. Since the applicant came to this country he had obtained employment and had earned a reputation for honesty. In February, 1905, the college accepted from the applicant 100*l.*, and in July, 1906, a further sum of 50*l.* in part payment of the amounts in question. Included in the depositions taken at Melbourne was that of F. A. Hunt, senior constable of police attached to the criminal investigation branch, Melbourne, Victoria, who stated that "by the Crimes Act, 1890, No. 1079, an Act now in force in the State of Victoria, the crime of larceny is punishable by imprisonment with hard labour for any term not exceeding five years."

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL, *Ex parte.*

Horace Avory, K.C., and *S. A. T. Rowlatt* shewed cause. Under s. 9 of the Fugitive Offenders Act, 1881, the Court is not concerned with the law of the United Kingdom, because that section says that the Act of 1881 is to apply to an offence notwithstanding that by the law of that part of the dominions of the Crown where the fugitive is it is not an offence. The section which gives the magistrate power to make the order is s. 5. The only question which the magistrate and this Court have before them is whether the facts disclose a prima facie case of an offence against a statute of the Colony of Victoria. The statutes which are in question in the present case are the Crimes Act, 1890, of Victoria, and the Crimes Act, 1890, Amendment Act, 1896, of Victoria. The witness Hunt, whose deposition is sent to this country, merely states that by the Crimes Act, 1890, of Victoria the offence of larceny is punishable with twelve months' imprisonment, so that it is within the Fugitive Offenders Act, 1881; and it must therefore be admitted that there is no expert evidence that the facts in this particular case constitute larceny by Victorian law. That must be gathered from the Victorian statutes. The Crimes Act, 1890, Amendment Act, 1896, of Victoria provides that certain acts shall be deemed larceny, and consequently be punishable under the Victorian Act of 1890 with twelve months' imprisonment. It is true that the facts in the present case do not bring the accused within s. 146 of the Crimes Act, 1890, of Victoria, because there does not appear to be any direction either in writing or verbally, but he may upon the facts come within s. 139 of that Act as a servant stealing something belonging to his employer. If there is evidence upon the depositions under the Crimes Act, 1890, of Victoria, shewing that the offence with which the accused is charged amounts to larceny under that statute, this Court is bound to look at the Crimes Act, 1890, Amendment Act, 1896, of Victoria, which amends the Victorian statute of 1890. The effect of s. 9 of the Fugitive Offenders Act, 1881, is that if there is any evidence of felonious stealing according to the law of Victoria the fugitive must be surrendered. In the present case the evidence is that contained in the deposition of the police-constable Hunt. It must be

admitted that it is doubtful whether he can be said to be an expert in law for the purpose of these proceedings; but the passage in Archbold's Criminal Pleading, Evidence and Practice, 23rd ed. p. 346—which says that "The law whether written or unwritten of a foreign country, or of any part of the King's dominions outside England, must be proved in English Courts by the oral testimony of witnesses of competent skill, and in the case of written law cannot be proved by the production of the written law itself, or of an authenticated copy. . . . . The law of a foreign country may also be ascertained by the Court here by obtaining an opinion on the subject from a superior Court of the foreign country whose law is in question, if a convention has been entered into between the British Government and that of the foreign State (24 & 25 Vict. c. 11). The law of one part of the King's dominions for the purpose of judicial proceedings in another part may be ascertained in a similar manner under 22 & 23 Vict. c. 63"—does not apply to fugitive offenders or extradition cases. If it does, it might be necessary for the Court to grant an adjournment in order that the law of the Colony of Victoria may be ascertained.

The point was not taken before the metropolitan magistrate. If it had been, the Agent-General for Victoria, who is in London and who is responsible for this prosecution, probably could have given evidence. The deposition of Hunt says that larceny, the crime with regard to which the original warrant was issued, is punishable under the Crimes Act, 1890, of Victoria by a term of imprisonment exceeding twelve months; therefore there is that amount of evidence that the crime of larceny is punishable under the statute of 1890.

[The *Sussex Peerage Claim* (1) and *Baron de Bode's Case* (2) were referred to.]

Sir Edward Carson, K.C., *C. W. Mathews*, and *Huntly Jenkins*, in support of the rule. The Court can only deal, in cases under the Fugitive Offenders Act, 1881, with crimes against the law of the country from which the prisoner is presumed to have come, but in the present case the only evidence on the depositions is with regard to the Crimes Act, 1890, of Victoria, and the Court

(1) (1844) 6 St. Tr. (N.S.) 79. (2) (1845) 8 Q. B. 208.

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL *Ex parte.*

will not take judicial notice of Colonial law. Upon that evidence alone the warrants were granted both in the Colony and here, and that is the only evidence before the Court. The rule as to proof of foreign law applies to Colonial statutes. The Court cannot take judicial notice of Colonial statutes. The proper mode of proof of the commission of an offence in a Colony is not by the production of the statute, but by skilled evidence; otherwise the Courts there might place an entirely different construction upon the terms of the statute to that which this Court gives to it. The duty of the magistrate in cases under the Fugitive Offenders Act, 1881, is entirely different from that in extradition cases, where the magistrate has to see whether the evidence of the crime, if it were committed in this country, would be sufficient. The passage in Archbold on Criminal Pleading, 23rd ed. p. 346, which in effect lays down the rule that Colonial law is to be ascertained in the same way as foreign law, applies to the present case. The mere production of the Colonial statute does not put the Court into possession of the construction placed upon it by the Courts in the Colony. A printed copy of a Colonial statute cannot, by itself, be looked at by the Court. The Colonial statute requires expert evidence to explain it in the same way as a foreign code.

In the present case there is no evidence that what the prisoner did amounted to larceny within the meaning of the Colonial statute. It was not necessary to take the point before the magistrate in order to enable it to be raised in this Court. A person in custody has a right to take the point at any time in proceedings under a writ of habeas corpus. But the point was taken before the magistrate that he had no right to adjudicate under the Crimes Act, 1890, Amendment Act, 1896, of Victoria, because the only deposition was as to the Crimes Act, 1890, of Victoria, assuming that a constable can be treated for this purpose as a legal expert. Further, having regard to the lapse of time that has taken place, that the point was in substance taken in the proceedings before the magistrate, which were protracted, and that the prosecution was commenced, if at all, under the Crimes Act, 1890, of Victoria, this Court ought not now to send the case back to allow the prosecution to reopen the case

on that point. By comparing ss. 8 and 10 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), with ss. 5 and 9 of the Fugitive Offenders Act, 1881, it becomes clear that this Court is not concerned with the question of whether a crime has been committed according to English law. The question is whether the prisoner has committed a crime in the part of the dominions of the Crown in which it is alleged to have been committed. Therefore it becomes of the very essence, in the case of fugitive offenders as distinguished from extradition, not that a crime would have been committed here, but that the facts constitute a crime abroad, and on that account the magistrate must have such evidence as will shew that the act of the prisoner constitutes a crime in the Colony.

The very foundation, therefore, of the jurisdiction of the magistrate must be that he should have before him the proper legal evidence to shew him what the ingredients of the offence are, so that he may apply the particular evidence before him. There ought to be a deposition by an expert. The Court has to decide whether a police-constable is an expert for this purpose.

[*In re Arton* (1) was referred to.]

LORD ALVERSTONE C.J. This case has been most ably argued, and it presents very great difficulties, to my mind. Having regard to the serious nature of the offence if proved, I have been much pressed with doubt as to whether we ought not to send the case back in order that the evidence which is suggested as being wanted should be supplied. On the other hand, there is the fact that the alleged offence occurred five or six years ago, and that there were some proceedings taken which were not carried further than the magistrate's warrant; and it appears on the depositions that the prisoner has been endeavouring to make some reparation and is now carrying on an honest life. It seems to me that under those circumstances it is better that we should deal with the case as it stands before us and give our decision strictly in accordance with our view of the effect of the Fugitive Offenders Act, 1881.

(1) [1896] 1 Q. B. 509.

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL, *Ex parte.*

Lord Alverstone C.J.

I express no opinion upon the question whether or not we should not receive evidence in any other case. My present opinion is that we might upon the present occasion either receive evidence in this Court if we thought it a proper case for such procedure, or send the case back to the magistrate for that purpose. It must not be considered that the present judgment of the Court in any way fetters the discretion or power of the Court in a future case to deal with the matter in any way they think right. I am of opinion that under s. 9 of the Fugitive Offenders Act, 1881, the magistrate has to be satisfied that the crime, "whether called felony, misdemeanour, crime or by any other name," is one "which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve calendar months or more, or by any greater punishment." I understand the meaning of that provision to be in substance that there must be, in order to justify an order being made under this Act, an offence punishable in the part of His Majesty's dominions where it is alleged to have been committed by that term of imprisonment. In my opinion every person who comes and asks for an order for the delivery up of a fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled. That is a very important matter, and having regard to the fact that we are dealing with the criminal law, we must apply the general principles of the criminal law, and the prosecutor must make out his case. We are also dealing with a branch of the criminal law which affects the liberty of the subject, and that condition should under ordinary circumstances be clearly fulfilled.

In the present case I see no evidence that the offence spoken of in the depositions was an offence punishable in the Colony of Victoria with a sentence of twelve calendar months' imprisonment. The only evidence that appears is that a senior police-constable stated that larceny was punishable by the Crimes Act, 1890, of Victoria with hard labour for a term not exceeding five years. Upon these depositions it is clear—indeed, it is not disputed—that it is not shewn that the facts upon which the person was

charged constitute an offence punishable by Victorian law by a term of twelve months' imprisonment. In order to establish that it is necessary that the statutes of Victoria should be regarded, and in my opinion the rule which applies to the proof of foreign law applies equally to the proof of Colonial statutes. The provisions contained in the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), supply one method of getting over that difficulty. But I express no opinion in this case as to what would or would not be sufficient evidence. I can well imagine that there might be sufficient evidence before the magistrate without any particular mode or machinery for bringing the Colonial law before the Court being followed or applied. In the present case it seems to me that at the outside all that was before the magistrate was that larceny is punishable by the Crimes Act, 1890, of Victoria with a certain punishment. In my opinion there was no evidence before the magistrate which brought the case within the condition required by s. 9 of the Fugitive Offenders Act, 1881, inasmuch as there was no evidence that the facts establish an offence punishable in the Colony of Victoria, in which it was alleged to have been committed, by imprisonment with hard labour for a term of twelve months or more. Therefore the order by the magistrate for delivery of the defendant into the custody of the keeper of Brixton Prison until he is thence delivered pursuant to the provisions of the Fugitive Offenders Act, 1881, was made without sufficient evidence and without the condition required by the statute being satisfied.

I have felt very grave doubt whether, having regard to the gravity of the offence, we ought not to send the case back to the magistrate, so that he might allow further evidence to be given as to the law of Victoria, or whether we might ourselves have required that evidence to be given to us; but on the whole, looking at the importance of the matter, and to the duty upon the persons desiring the surrender or delivery over of the fugitive offender to fulfil the conditions of the statute of 1881, it is in my judgment safer and wiser in this case to say that the order of the magistrate was made without sufficient evidence, and therefore without jurisdiction, and must be discharged.

1907

REX v. GOVERNOR OF BRIXTON PRISON. PERCIVAL, *Ex parte.*

DARLING J. I am of the same opinion, and I agree entirely with what the Lord Chief Justice has said. It is necessary that the magistrate should have before him the evidence of what is the law of the portion of the King's dominions to which it is desired to send back the fugitive offender for trial, it being alleged that he did there commit an offence against that law. There is nothing derogatory about this with regard to the Colony, and I desire to say so because it applies to other parts of the King's dominions as well as to this Colony, and no doubt in the Colony they would require proof of our domestic law in England before thinking it necessary to act upon it. What I have a doubt about in this case is whether we are justified in deciding it without doing that which I am quite clear we could do, viz., either send it back to the magistrate and point out to him the defect in the proceedings as they at present come before us, and allow him to have the prosecution reopened and evidence given, or else require for our own nformation an affidavit shewing what the law of Victoria applicable to this case is. In some respects the objection taken on the present occasion may be regarded as a technical one, and in some circumstances the Court might take one of the courses I have just indicated for the purpose of removing it. But I think we are justified by all the circumstances in not sending the case back to the magistrate, and in not requiring proof before ourselves which might remove the objection which has been taken on behalf of the applicant.

PHILLIMORE J. I agree, and have nothing to add.

Rule absolute.

Solicitor for applicant: *A. J. E. Newton.*
Solicitor for respondent: *Treasury Solicitor.*

J. E. A.

SAMUEL BROTHERS, LIMITED *v.* WHETHERLY.

1907

Jan. 18, 23, 24, 29.

Army and Navy—Volunteer Corps—Commanding Officer—Liability on Contract—Goods supplied for Use of Corps—Volunteer Act, 1863 (26 & 27 *Vict. c.* 65), *ss.* 16, 25—*Regulations* 407, 587.

Where orders are given by or on behalf of the commanding officer of a volunteer corps personally for goods for the use of the corps, and the goods are accordingly supplied, the commanding officer is personally liable for the price. If he dies before they have been paid for, his personal representatives are liable, and they cannot resist payment on the ground that the property in the goods so ordered and supplied has passed to the succeeding commanding officer.

Action tried before Walton J. without a jury.

The plaintiffs, Messrs. Samuel Brothers, Limited, claimed from the defendants, the executors of the late Colonel Whetherly, a sum of 2312*l.* 5*s.* 8*d.*, alleged to be due on account of uniforms and other goods supplied for the use of the East London Royal Engineers Volunteer Corps (formerly the Second Tower Hamlets Volunteers Royal Engineers) whilst Colonel Whetherly was the commanding officer of that corps. He became commanding officer of the corps on October 22, 1890, and occupied that office until his death on January 9, 1903. At that date there was owing to the plaintiffs on the balance of the account for the period in question the sum of 2312*l.* 5*s.* 8*d.* for goods supplied to the corps during Colonel Whetherly's term of office. The plaintiffs alleged, and the defendants denied, that Colonel Whetherly made himself personally liable for the goods so supplied.

By s. 25 of the Volunteer Act, 1863, all money subscribed for the use of a volunteer corps, and all the effects belonging to any such corps, or lawfully used by it, and the exclusive right to sue for and recover money due to the corps, and all lands acquired by the corps, shall vest in the commanding officer for the time being and his successors, with power for him and his successors to sue and make contracts and conveyances, and to do all other lawful things relating thereto, and any civil or criminal proceeding taken by virtue of this section by the commanding officer shall

1907

SAMUEL BROTHERS, LIMITED v. WHETHERLY.

not be discontinued or abated by his death, resignation, or removal from office, but may be carried on by and in the name of his successors. Regulation 407 of the Regulations for the Volunteer Force, 1901, made under s. 16 of the Act of 1863 is, in so far as it is relevant, in the following terms: "In accordance with s. 25 of the Volunteer Act, 1863, and s. 9 of the Regulation of the Forces Act (1), the whole of the property of a volunteer corps is vested in the commanding officer for the time being, and he is solely responsible for the proper administration of all moneys and other property belonging to the corps. The rules and by-laws of a corps cannot relieve the commanding officer from full responsibility for the custody and administration of the property and moneys of the corps except as regards such portion of the property of 'a constituent corps' as was acquired before the date of consolidation, and was reserved to such corps under the Regulation of the Forces Act, 1881; nor can they relieve him from responsibilty or liabilities incurred on his behalf by officers commanding detachments. To aid him in the management of the finances of the corps, a finance committee will be appointed, consisting of not less than three members besides the commanding officer. All orders to tradesmen on behalf of the corps should be given by the commanding officer alone, and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts, so that he alone may remain liable for such expenditure. If the finance committee give orders to, or enter into contracts with, tradesmen for supplies, they will become jointly and severally liable for the expenditure arising from such orders or contracts. The finance committee is responsible for limiting the expenditure of the grants made from public funds to such purposes as are sanctioned by the regulations, for presenting annually to the corps a correct statement of the receipts and expenditure of such funds, and for advising the commanding officer from time to time as to the financial position of the corps." The principal revenue of a corps arises from the capitation allowance; and by regulation 587 this must be paid into a bank to the joint account of the commanding officer and the three other members

(1) Regulation of the Forces Act, 1881 (44 & 45 Vict. c. 57).

1907

SAMUEL BROTHERS, LIMITED v. WHETHERLY.

of the finance committee, and payments by the bank are to be made on drafts of the commanding officer and the three members or of such of their number (not less than two) as they may conjointly empower to draw cheques. Under the Volunteer Act, 1863, and the Volunteer Act, 1897 (60 & 61 Vict. c. 47), certain rules were made applying to the particular corps in question. By rule 17 it was provided that "no member of the finance committee shall incur any personal liability beyond his annual subscription. The commanding officer being alone responsible, no liability of any kind whatever shall be incurred without his authority in writing being first obtained."

Walton J. was of opinion upon the evidence that the orders for the goods in question were given with the knowledge and approval of Colonel Whetherly. Although very few of the orders were given or signed by him personally, the judge had no doubt that he intended that the orders, whether actually signed by him or not, should be given in accordance with the regulations—that is to say, by him or on his behalf personally. The judge found that they were in fact so given. He further found as a fact that the plaintiffs did not supply the goods on the mere chance or expectation that they would be paid for out of the revenue of the corps. They supplied them in the belief that some one was legally liable to pay for them. Colonel Whetherly was in fact the principal in the transactions. After the death of Colonel Whetherly, who had been a member of the finance committee, the plaintiffs, in the first instance, applied for payment to Colonel de Lara Cohen, who was Colonel Whetherly's successor as commanding officer. Colonel de Lara Cohen had also been a member of the finance committee of the corps during the period in question in this action, and had acted as commanding officer whilst Colonel Whetherly was in South Africa during the year 1900; and some of the orders for the goods in respect of which this action was brought had been ordered by him—or, at all events, whilst he was acting as commanding officer in place of Colonel Whetherly during his absence. No claim was made against the defendants until it was suggested to the plaintiffs by Colonel de Lara Cohen's solicitors, in a letter of October 20, 1903, that the executors of Colonel Whetherly were the only

1907

SAMUEL BROTHERS, LIMITED v. WHETHERLY.

persons liable. The judge found that it was perhaps true that the plaintiffs, in supplying the goods in question, did not very much consider the question of who personally was liable to pay for them. They expected, no doubt, to be paid out of the funds of the corps. But although, in the first instance, they applied for payment to Colonel de Lara Cohen, they did nothing to waive their right (if any) to claim payment from the representatives of Colonel Whetherly.

Rufus Isaacs, K.C., and *Le Riche*, for the plaintiffs. As the goods were ordered by Colonel Whetherly or on his behalf, he became liable for the price of them, and the defendants, as his personal representatives, are therefore liable in this action. Under s. 25 of the Volunteer Act, 1863, and regulation 407 of the Regulations for the Volunteer Force, 1901, which is recognized by rule 17 of the rules of the corps, the commanding officer, if in fact he orders goods, is liable, in the absence of an express contract to the contrary, to pay for them.

Foote, K.C., and *H. Stuart Sankey*, for the defendants. The regulations are only intended to operate with respect to the officers inter se. They do not create any liability which would not exist if they had not been made. In order to succeed the plaintiffs must shew that Colonel Whetherly ordered the goods intending to be personally liable for their price, and that they in supplying them knew that he intended to be personally liable and looked to him for payment. It is not sufficient for them merely to shew that Colonel Whetherly ordered the goods. It appears from the evidence that the plaintiffs in fact looked for payment, not to any particular person, but to the capitation grant which is not vested in the commanding officer. If so, the defendants are under no liability: *Jones* v. *Hope* (1); *Prosser* v. *Allen*. (2) [*Cross* v. *Williams* (3) was also referred to.]

Rufus Isaacs, K.C., in reply. The authorities cited on behalf of the defendants are anterior in date to the Volunteer Act, 1863. The object of the Act of 1863 and the regulations is to prevent the very thing that happened in *Cross* v. *Williams*. (3) Inasmuch

(1) (1880) 3 Times L. R. 247, n. (2) (1819) Gow, 117.
(3) (1862) 7 H. & N. 675.

as it is discreditable to the State that a provider of equipment should not be paid, the Legislature has, in effect, enacted that tradesmen who supply goods should not be placed in the position of not being able to recover the price. All the property is vested in the commanding officer, and it is therefore impossible to sue the corps. Nor does it avail the defendants to contend that the plaintiffs ought to have sued the finance committee, for Colonel Whetherly was a member of it, and each member of the finance committee is jointly and severally liable. *Jones* v. *Hope* (1) is an authority in favour of the plaintiffs, because it shews that they could sue the finance committee, and it is immaterial in which form they sue the representatives of Colonel Whetherly, whether by reason of his having been commanding officer or a member of the finance committee. It is true that the Act of 1863 does not entitle the plaintiffs to say that by the mere production of the regulations and the statute of 1863 they have proved their case, but the effect is that a presumption arises in their favour from the fact that Colonel Whetherly gave the orders by himself, or his agent.

Cur. adv. vult.

Jan. 29. The following judgment was read by

WALTON J., who, after stating the facts, continued:—The general effect of the Acts and regulations is clear. The property of the corps is vested in the commanding officer for the time being, and passes from the commanding officer on his death or retirement to his successor. The regulations require that all orders to tradesmen on behalf of the corps shall be given by the commanding officer alone, so that he alone may remain liable for such expenditure. It seems to follow that if, for example, uniforms are supplied on the orders of the commanding officer personally, so that he alone is liable to pay for them (as the regulations require), and he dies after they have been supplied and before they have been paid for, his executors are liable for them, although the property in the goods so supplied vests in the commanding officer who succeeds. I can find nothing in the Act or regulations made under the Act which transfers the liability from the commanding

(1) 3 Times L. R. 247, n.

1907

SAMUEL BROTHERS, LIMITED v. WHETHERLY.

Walton J.

officer who has given the orders to his successor. But it must be remembered there is nothing in the Act or regulations which says that the commanding officer is liable for all goods supplied for the use of the corps. The effect of the Act and regulations is that all orders for such goods should be given by the commanding officer personally. He is not bound to give orders, and goods may be supplied for the corps upon orders given not by or for the commanding officer or in such a way as to make him personally liable. If, however, orders are in fact given by or on behalf of the commanding officer for goods for the use of the corps he is liable for them. If he dies before they have been paid for, it seems to me that his executors are liable, and they cannot resist payment on the ground that the property in the goods so ordered and supplied passes to the succeeding commanding officer. The result may be extremely hard upon the family of the deceased commanding officer. I have no doubt that ordinarily the difficulty is met by some arrangement under which the liabilities are discharged from the revenue of the corps. It is unfortunate that such an arrangement could not be made in the present case. The result is that I have to deal with the question of the legal liability of the defendants to the plaintiffs. The defendants contend that the plaintiffs did not supply the goods in question upon the credit of Colonel Whetherly personally; that they supplied them, not on the personal credit of anyone, but upon the expectation that they would be paid for by the commanding officer or the finance committee for the time being out of the capitation allowance. They rely on the fact that after the death of Colonel Whetherly the plaintiffs, in the first instance, applied for payment to Colonel de Lara Cohen, who was Colonel Whetherly's successor as commanding officer. And it may be added that Colonel de Lara Cohen had been a member of the finance committee of the corps during the period in question in this action, and had acted as commanding officer whilst Colonel Whetherly was in South Africa during the year 1900; and some of the orders for the goods in respect of which this action was brought had been ordered by him—or, at all events, whilst he was acting as commanding officer in place of Colonel Whetherly during his absence. It is further said, on behalf of the defendants,

that no claim was made against the defendants until it was suggested by the solicitors of Colonel de Lara Cohen, in a letter of October 20, 1903, that the executors of Colonel Whetherly were the only persons liable. It is perhaps true that the plaintiffs, in supplying the goods in question, did not very much consider the question of who personally was liable to pay for them. They expected, no doubt, to be paid out of the funds of the corps. But although, in the first instance, they applied for payment to Colonel de Lara Cohen, it must be observed that they did nothing to waive their right (if any) to claim payment from the representatives of Colonel Whetherly. What their solicitor says in his letter of October 21, 1903, in answer to the letter of Colonel de Lara Cohen's solicitors' letter of October 20, is this: "You allege that all the debts of a regiment are incurred by the commanding officer personally. This allegation is true; but it by no means follows that no other member of the regiment is liable, and I am not at all sure that every member of the regiment is not individually liable for goods supplied to it, and particularly the members of the finance committee and the colonel for the time being." This contention is probably wrong, but it is clear that the plaintiffs reserved their right (if any) to claim payment from the representatives of Colonel Whetherly. I do not think that it is necessary for me to refer to the facts or evidence in detail, I have to discharge the functions of a jury. I have considered the evidence given before me orally and all the documents in the case. I have no doubt upon this evidence that the orders for the goods in question were given with the knowledge and approval of Colonel Whetherly. It is true that very few of the orders were given or signed by him personally; but I have no doubt that he intended that the orders, whether actually signed by him or not, should be given in accordance with the regulations—that is to say, by him or on his behalf personally. I find that they were in fact so given. If this be so, if he was the person by whom or on whose behalf personally the orders were in fact given, he was liable personally for the goods supplied upon such orders; and if he was liable the defendants are liable. On this ground I think that the plaintiffs are entitled to succeed. Even if the plaintiffs when

1907

SAMUEL BROTHERS, LIMITED v. WHETHERLY.

Walton J.

they supplied the goods did not know who was legally liable to pay for them it would, I think, make no difference if, as I have found, the orders were in fact given by or on behalf of the commanding officer. I do not think that the plaintiffs supplied the goods on the mere chance or expectation that they would be paid for out of the revenue of the corps. There is no doubt they supplied them in the belief that someone was legally liable to pay for them. It is difficult to find any evidence of what was in the minds of the directors or the manager of the plaintiff company. The company has for a long time been supplying goods to volunteer corps. The manager probably knew the effect of the Volunteer Act and the regulations, and probably supplied the goods in the belief that the commanding officer was liable; but I do not decide the case on that ground. I think that the plaintiffs are entitled to succeed, because the goods were in fact ordered by the commanding officer or on his behalf. He was, in fact, the principal in the transactions, and the plaintiffs are entitled to look to him for payment. I have said that it is unfortunate that some arrangement could not be made by which the liability in question might be discharged out of the funds of the corps. I wish to add that in saying this I have no intention to impute any blame for it to anyone, either to the present commanding officer or to the plaintiffs or to the defendants. It is not my duty to express any opinion on this subject, and I have not the materials before me which would enable me to do so. Some such arrangement may still be possible. But, however that may be, I have to deal only with the question of legal liability. For the reasons which I have stated I think there must be judgment for the plaintiffs. With regard to the costs, I am afraid that I should not be justified in departing from the rule which after all, broadly and generally speaking, is the only rule which does justice, and I think the costs must follow the result. I give judgment for the plaintiffs for 2312*l.* 5*s.* 8*d.* with costs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *A. E. Sydney.*

Solicitor for defendants: *Wellington Taylor.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1907
Jan. 28, 29, 30.

GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION.

Poor Rate—Rateable Value—Railway—Link Line—Interest on Cost of Construction—Evidence—Admissibility of Matters outside the Parish.

A railway company under agreement with the G. W. R. Company constructed a short link line connecting the railway systems of the two companies for mutual interchange of traffic; there were no stations or sidings on this link line and it originated no traffic, and no other railway company could have been found to acquire it:—

Held (adopting the line of cases of which *South Eastern Ry. Co.* v. *Dorking*, (1854) 3 E. & B. 491, is an instance, in preference to the line of cases of which *Great Eastern Ry. Co.* v. *Haughley*, (1866) L. R. 1 Q. B. 666, and *Reg.* v. *Llantrissant*, (1869) L. R. 4 Q. B. 354, are examples), that the cost of the construction of the link line was an element to be taken into consideration in arriving at its true rateable value.

Decision of the Divisional Court, [1906] 1 K. B. 597, reversed.

APPEAL from a decision of a Divisional Court on a case stated by the quarter sessions of the county of Oxford. (1)

The question for decision was whether, in assessing a link line connecting two main line systems of railways, extraneous matters—e.g., interest on the cost of construction—were admissible as evidence which might be taken into consideration in arriving at the true rateable value of this link line.

The case stated by quarter sessions is set out in detail in the report in the Court below, but the facts material for the purposes of this report were very few, and are as follows:—

The Great Central Railway Company, under an agreement with the Great Western Railway Company, constructed a short piece of line some eight miles in length connecting the railway systems of the two companies for the purpose of a mutual interchange of traffic. The cost of constructing this line was 280,000*l.*, which was advanced to the Great Central Railway Company by the Great Western Railway Company at interest at 3½ per cent. per annum.

There were no stations or sidings on this link line and it

(1) [1906] 1 K. B. 597.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

originated no traffic. No railway company, other than the Great Central and the Great Western Railways, could have been found to acquire the line.

The Court of quarter sessions, in assessing the rateable value of one mile forty-seven chains of this line in the parish of Wardington, held that interest on the cost of construction of the line was a matter they were entitled to take into account, as an element of calculation, in ascertaining the rateable value, and assessed so much of the line as lay in this particular parish at 1390*l.* gross estimated rental and 795*l.* rateable value. It was agreed that if the contention of the railway company was the right one, and what is known as the "parochial principle" were adopted, the assessment of the line within this parish ought to be reduced to 593*l.* gross estimated rental and 102*l.* rateable value.

The Divisional Court (Lawrance and Ridley JJ.) overruled this assessment, and held that for the purpose of arriving at the rateable value of the line the capital sum expended on its construction was not an element which could be taken into consideration. The assessment committee of the union appealed.

The appeal was heard on January 28, 29, 30.

W. Ryde and *Cecil Walsh*, for the appellants. The value of this small piece of land to the railway company cannot be measured by what it actually earns; it has a contributive value both to the Great Western and to the Great Central, as it secures a through traffic of passengers and goods for both trunk lines, which otherwise would go by another route. The yearly interest on the cost of construction is an element to be taken into consideration in calculating the rent which the hypothetical tenant would pay according to the terms of the Parochial Assessments Act, 1836, s. 1. Profits are not rateable, but they are an element to be considered in a case like the present, where the line is one to which the ordinary parochial principle is not applicable. The cases on this subject are conflicting and cannot be reconciled, but the trend of the majority and of the more recent decisions is in favour of the proposition that extraneous matters can be taken into consideration in valuing a line of this character.

The foundation of the parochial principle is *Rex* v. *Kingswinford* (1), but when carefully looked at it does not decide the question now before the Court, and, moreover, being before the Parochial Assessments Act, 1836, it is not now binding. In *Reg.* v. *Great Western Ry. Co.* (2) the principle that "contributive value" may be the foundation of rateable value seems to be accepted. In *Reg.* v. *London, Brighton and South Coast Ry. Co.* (3) matters locally situate without the parish, but affecting the amount of the net annual value, were held to fall within the inquiry. In *Reg.* v. *Grand Junction Ry. Co.* (4) the mileage principle of the whole line was adopted in assessing an unprofitable branch, and all existing circumstances were taken into account, and so too in *Rex* v. *New River Co.* (5) extrinsic circumstances were considered; and in *Reg.* v. *Great Western Ry. Co.* (6) the consideration of expenses incurred elsewhere was held not to be precluded by the parochial principle. The appellants contend that the parochial principle is not to be regarded as the only principle applicable to all cases. In *Newmarket Ry. Co.* v. *St. Andrew's-the-Less, Cambridge* (7) a sum paid by way of guarantee by another company was not allowed to be taken into account in rating a branch line worked at a loss: this decision is opposed to the present contention, but in the same year we have *South Eastern Ry. Co.* v. *Dorking* (8), where the majority of the Court were of opinion that rent based on a percentage of capital raised was a matter to be taken into account; the line must not be rated beyond the rateable value taken as a whole—*Reg.* v. *West Middlesex Waterworks* (9)—but this can be adjusted afterwards. *South Eastern Ry. Co.* v. *Dorking* (8) has been followed in *London and North Western Ry. Co.* v. *Cannock* (10), *Reg.* v. *London and North Western Ry. Co.* (11), and *London and North Western Ry. Co.* v. *Irthlingborough* (12); and these cases establish the principle that in rating a branch line contributive value can be taken into account.

(1) (1827) 7 B. & C. 236.
(2) (1846) 6 Q. B. 179.
(3) (1851) 15 Q. B. 313.
(4) (1844) 4 Q. B. 18.
(5) (1813) 1 M. & S. 503.
(6) (1852) 15 Q. B. 379 and 1085.
(7) (1854) 3 E. & B. 94.
(8) 3 E. & B. 491.
(9) (1859) 1 E. & E. 716.
(10) (1863) 9 L. T. 325.
(11) (1874) L. R. 9 Q. B. 134.
(12) (1876) 35 L. T. 327.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Rent paid is an element in arriving at rateable value: *Reg.* v. *Eastern Counties Ry. Co.* (1) It is true that in *Great Eastern Ry. Co.* v. *Haughley* (2), *Reg.* v. *Llantrissant* (3), and *Great Western Ry. Co.* v. *Ilminster* (4) it was held that contributive value must be excluded from consideration, and that rateable value must be based on the receipts and expenses of each parish; but these cases are inconsistent with the bulk of the earlier authorities, and are practically overruled by *Reg.* v. *School Board for London* (5) and *London County Council* v. *Churchwardens, &c., of Erith.* (6) *Reg.* v. *School Board for London* (5) shews that competition is not essential to the admissibility of the agreement fixing the rent. It is clear from *North and South West Junction Ry. Co.* v. *Brentford Union* (7) that rent paid for the line may be taken into consideration; and this case shews that the two methods of assessment are open, otherwise the case would not have been sent back to the arbitrator, and that the parochial principle is not the only principle that can be applied: the choice of principles is for the Court of quarter sessions, who, in this case, have taken the cost of construction into consideration, and if they were entitled to do this there is no ground for appeal. Unless the Court of quarter sessions have wrongfully included or excluded something, this Court cannot interfere: per Lord Halsbury, *Mersey Docks and Harbour Board* v. *Birkenhead.* (8) Interest on cost of construction being therefore properly admissible as some evidence of value, the Court will not disturb what is really a finding of fact.

Balfour Browne, K.C., Sir E. Boyle, K.C., and *Snagge*, for the respondents. The basis of all rating is that defined by the Parochial Assessments Act, 1836, s. 1, "the rent at which the same might reasonably be expected to let from year to year," after allowing for taxes, &c.; therefore a rent in perpetuity or for a long term of years is not the true basis on which rateable value is to be assessed; 9800*l.*, the interest on capital,

(1) (1854) 23 L. J. (M.C.) 96, n.
(2) L. R. 1 Q. B. 666.
(3) L. R. 4 Q. B. 354.
(4) (1881) 4 Knight's L. G. R. 99, n.
(5) (1886) 17 Q. B. D. 738.
(6) [1893] A. C. 562.
(7) (1887) 18 Q. B. D. 740; (1888) 13 App. Cas. 592.
(8) [1901] A. C. 175, at p. 184.

is not a rent which any tenant would give from year to year. In some cases rent may be taken into consideration—it has been taken into consideration in many of the cases cited—but interest on capital expended cannot be taken as equivalent to rent; no case has been cited, or can be found, where interest has been so treated.

There is nothing in the present case which will justify the Court in departing from the ordinary method of assessing a railway: this line is an integral part of the Great Central system, and therefore ought to be assessed on the ordinary parochial principle; the fact that it originates no traffic is immaterial. No higher rent should be fixed, as the basis of assessment, than that which in the circumstances the owner would be ready and willing to pay for the occupation of the premises: *London County Council* v. *Churchwardens, &c., of Erith* (1); profits have to be taken into account, and the object of the occupier would be to make a profit out of the thing occupied. A distinction is made between productive and non-productive properties; this distinction is always observed: *Reg.* v. *West Middlesex Waterworks.* (2) This link line directly conduces to the earnings of the whole system, and must be rated on the same principle as any other part of that system, and the cost of construction has nothing to do with its rateable value; neither is it a fact properly admissible as evidence which can be taken into consideration in fixing the value.

North and South West Junction Ry. Co. v. *Brentford* (3) is not an authority which supports the appellants' contention; the arbitrator there, after the case was sent back, found the value on the parochial principle, and upon the case going again to the House of Lords they awarded the appellants their costs. The amount expended on construction is no guide to the rent which a hypothetical tenant would pay. In most of the cases relied on by the appellants there was a rent or a competitive value; and that fact alone distinguishes the present from the cases relied on, for it is admitted here that there is no one else who would acquire this line.

(1) [1893] A. C. 562, at p. 592.
(2) 1 E. & E. 716.
(3) 18 Q. B D. 740; 13 App. Cas. 592.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

VAUGHAN WILLIAMS L.J. In my judgment this appeal ought to be allowed. In the main I agree very much with the observations of Lawrance and Ridley JJ. as reported at [1906] 1 K. B. 597, pp. 602 and 604, and if the contention of the Banbury Union had been that which those two learned judges assumed it to have been, their judgments would have been perfectly right. But in my opinion they really did not take the contention to be that which, according to the statement of the case by the Court of quarter sessions, it really was. [Having read the contention of the parties as stated in the case and the judgment of Lawrance J. at p. 603 in support of this statement, the Lord Justice continued:—]

My view is that the fact that interest on the sum of 280,000*l.* has been paid is one that cannot properly be excluded from consideration. It is a matter which, in connection with other facts, may properly be considered by those who have to assess the rent which they think the hypothetical tenant would pay, dealing with that rent in accordance with the very terms of s. 1 of the Parochial Assessments Act, 1836, which defines the statutory question which has to be determined. They are to make the rate "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

It is quite plain that when you come to consider the amount of rent that a hypothetical tenant would pay in the case where the hereditament in question is a part of a great industrial undertaking, the figure is not one that can be arrived at with any mathematical or arithmetical certainty; it always must be a matter for speculation more or less. Of course, you start with the absolute rule that that which you have to value is the hereditament in the parish, and you have to ask yourself what the hypothetical tenant would be likely to be willing to pay for the privilege of occupying that hereditament as a tenant for the

year; and when you are asking that question in the case of these industrial undertakings, you have to ask yourself what are the profits which the hypothetical tenant would enable himself to receive by the occupation of this hereditament. It is, of course, true that profits, as such, are not rateable; what you have to consider is the tenancy of the land. But when you come to deal with the value to a hypothetical tenant of a hereditament which is part of a great industrial undertaking, and especially if it extends outside the limits of this particular parish, you have a very difficult question to answer in fixing the rent which the hypothetical tenant might be expected to pay; and in practice you do take into consideration the gross returns which he may be expected to take, and also the deductions from those gross returns, before you arrive at the net profit, with the result that in cases of this sort, as distinguished from the ordinary case of a residential house, you do take profits into consideration, although profits are not in themselves rateable.

So far I have only been stating matters upon which there is no dispute. After the birth of great industrial undertakings like canal and railway companies, who were the occupiers of hereditaments in various parishes, the question as to what was the proper assessment to make in respect of the properties occupied by them gave a great deal of trouble to the Courts. The parochial principle was adopted, and in the working out of the results the application of the parochial principle was found convenient to deal with the total net profits of the company, and to divide them on a mileage principle, in order to arrive at the assessment. But it is to be observed that the Legislature does not lay down any particular method which is to be of universal application in the assessment of the rateable value of a hereditament. The determination of the question is, prima facie, a question of fact; and so long as the overseers, who have to decide the question of fact, do not include as an element of consideration matters that ought not to be included, or do not exclude matters that ought to have been included, the Court leaves a discretion in the overseers as to the method which they will apply in the particular valuation.

Questions have frequently arisen as to the kind of matters the

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Vaughan Williams L.J.

overseers are entitled to take into consideration, and one question which arose very early was how far the overseers were entitled to take into consideration profits, advantages, or matters arising outside the parish in which the hereditament was situate; and on this point the cases which have been decided are neither uniform nor reconcileable. On one side there are cases like *Great Eastern Ry. Co.* v. *Haughley* (1), *Reg.* v. *Llantrissant* (2), and *Great Western Railway* v. *Ilminster* (3), which go a long way to shew that the overseers would not be entitled to take into consideration these profits outside the parish in which the rateable hereditament is situate.

But there is a long line of cases to the contrary effect, which I will describe as cases of a character of which *South Eastern Ry. Co.* v. *Dorking* (4) is an instance, which decided that, although you can only take into consideration the value to the occupier of the land within the particular parish, still, if the value of that land to him is enhanced by matters outside the parish, you have the right to take into consideration the value of the hereditament to this man, the occupier, in assessing the value of the hereditament. I do not propose to read all the cases at length which they have cited to us in the course of the argument. To a large extent the cases of the type to which I am now referring are set out in the argument of Mr. Ryde, as reported in this case in the Court below (5), cases of the description of *London and North Western Ry. Co.* v. *Cannock* (6), which very well illustrates this class of cases. In that case a branch line yielded no profit of itself, but contributed to the traffic and the profit of the main line, and it was held that the branch was to be assessed not merely in respect of its own earnings, but with respect to the value to the company, as bringing a profit to the main line. Blackburn J. said:—"What would be the elements of the rent? Why, amongst others, the capacity to add to the takings of the main line?" The proposition decided by this line of cases is one which, as I understand it, is affirmed by the House of Lords in two

(1) L. R. 1 Q. B. 666.
(2) L. R. 4 Q. B. 354.
(3) 4 Knight's L. G. R. 99, n.
(4) 3 E. & B. 491.
(5) [1906] 1 K. B. 597, at p. 601.
(6) 9 L. T. 325.

comparatively modern cases, one of which is *North and South Western Junction Ry. Co.* v. *Brentford Union* (1), from which I will read a passage from the judgment of Lord Watson (2), which puts the point very tersely indeed. He says: "My Lords, there are principles of valuation which depend on purely legal considerations, and any misapplication of these is open to correction by the Courts. But there are also certain so-called principles of valuation which are simply formulæ for arriving at the solution of questions of fact, which have commended themselves to valuators of experience. There may be several alternative formulæ of that kind, all of them capable of leading to a just and reasonable conclusion. It is for the arbitrator, who is constituted the judge of the facts, to determine for himself which rule of that kind he will accept for his guidance." What I wish to say about that case, without going through a number of cases at length, is shortly this: That when once you arrive at the conclusion arrived at by the majority of the Court of Queen's Bench in *South Eastern Ry. Co.* v. *Dorking* (3), that you may take into consideration any matter which a reasonable man would think would enhance the value of the hereditaments to a hypothetical tenant, you cannot upset a valuation made by overseers merely upon the ground that they have taken such matters into consideration. The matters must be matters which are reasonably relevant, as is pointed out by Blackburn J. in *London and North Western Ry. Co.* v. *Irthlingborough* (4), where it was suggested that the fact that the structural cost of the line which had been made some twenty-five years before, at a cost of 17,000*l.* a mile, was a matter which reasonably might be treated as relevant upon the question of what rent the hypothetical tenant might be expected to pay. Blackburn J. in that case was dealing with the contentions of the appellants and respondents, and the findings of the Court of quarter sessions upon those contentions, and he says: "I do not think we can say upon the facts as we find them in this badly stated case, that the quarter sessions have been wrong. In the previous appeal concerning this line, we determined that, in consequence

(1) 13 App. Cas. 592.
(2) Ibid. at p. 594.
(3) 3 E. & B. 491.
(4) 35 L. T. 327.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Vaughan Williams L.J.

of the completion of other lines, one element for fixing the rateable value was the enhanced traffic which the tenant would enjoy elsewhere." That is the matter shewn to be properly an element of consideration by the line of cases of which *South Eastern Ry. Co.* v. *Dorking* (1) is an example. Then he goes on: "Now the facts here are found according to the law as we there laid it down"—that is that you might take into consideration the enhanced traffic which the tenant would enjoy elsewhere—"and we can only say that the application to such a case as this is what we intended. There is still left the apportionment amongst the several parishes about which our opinion is not asked. The second finding of the quarter sessions is, that this line was constructed at a cost of 17,000*l.* per mile; this, however, is quite irrelevant to the question of rating, which depends only on what a hypothetical tenant would pay by the year. Then the quarter sessions find, thirdly, that the gross earnings of the line in this parish were less than the expenses; this may be right or wrong as a matter of fact, but no question is raised upon it for our consideration. In my opinion, the third contention of the respondents, taken with the first finding of the quarter sessions, is perfectly right. When there are no direct rateable profits, the line in a parish is liable to be rated on the basis of receipts derived from traffic on the other parts of the line; and this is the test of the hypothetical tenant's rent. The respondent's second contention is wrong, but the quarter sessions were right in finding upon their first and third contention that the appellants were properly rated for their occupation of land in the respondent parish in proportion to the profits calculated upon the whole Blisworth and Peterborough line. This was the principle we established in *Reg.* v. *London and North Western Ry. Co.* (2), and although this may be a stronger case, the principle has been here rightly applied." So that when once evidence such as is here described by Blackburn J. is admissible, it is no ground for upsetting a valuation that there might have been another method of valuation adopted, or even that the other method of valuation would have been one more generally adopted. I understand that to be the meaning of what is said by Lord Halsbury in the case

(1) 3 E. & B. 491. (2) L. R. 9 Q. B. 134.

of the *Mersey Docks and Harbour Board* v. *Birkenhead* (1) where he says: "My Lords, observations have from time to time been made by some learned judges saying that this should have been done or the other should not have been done in rating cases; but that was not as pronouncing judgment upon the law of evidence as to whether or not such and such a topic was legitimate or not in order to arrive at the conclusion which the Legislature had directed the overseers to arrive at, but merely indicating what was the ordinary and reasonable means of arriving at the conclusion at which they were bound to arrive. My Lords, I am the more anxious to point this out because I think in these later days we have got rid of a good many of those sources of confusion which arose from the advisory character, as I have said, of the judgments given by various Courts—we have, I hope, got rid of the confusion arising from words being used not in the strict sense, but as a matter of advice to the justices in determining such questions, and sometimes getting printed in the *Law Reports* as if they were decisions upon the law of evidence in this country. My Lords, I protest against any such view; and in this very case, although, as I said, during the last half-century we have arrived at conclusions which get rid of a great deal of the confusion that at one time existed, I find that one learned judge, Channell J., uses a phrase which I am afraid I cannot assent to, namely, that 'wherever you can arrive at' the value 'in that way which is the ordinary way'—that is, 'by comparing it with other similar tenements'—'you are bound to arrive at it in that way.' If that means that that is the facile and proper mode of doing it I should agree; but if it is laid down as a proposition of law that that is the only means by which it can be arrived at, I am bound to say I am not able to assent to that view." Then he says: "Again, my Lords, I find that Collins L.J. says in the same way: 'Hence the rule that in ordinary cases where the standard of rent is applicable evidence of actual profit made cannot be received. But it is equally true that where no such standard of comparison exists, it is legitimate to inquire into the profits actually earned.' Again, I am compelled to say that I cannot concur with the form in which that proposition

(1) [1901] A. C. 175, at p. 181.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Vaughan Williams L.J.

is put. It is not a question of deciding what, according to the law of evidence, is receivable, but what is the natural and ordinary and usual mode by which you can answer the proposition put by the Legislature to the overseers." In the present case, if the question had been that which Lawrance and Ridley JJ. assumed it to be, namely, whether the Court of quarter sessions had done something that, as a matter of law, was wrong by treating that as a measure which was not a measure, then the decision of the King's Bench Division ought to be affirmed here; but to my mind it is not so. The only question which arises here is that raised by the railway company, who suggested that this evidence was not admissible, and assuming it to be admissible (as I have no doubt myself that it was admissible, upon the basis of those cases to which I have already referred), we have nothing to do with the most convenient method of answering the question which the Legislature says by the Parochial Assessments Act, 1836, is to be answered by the overseers in assessing the value of a hereditament for rating purposes.

Under those circumstances I think this evidence was admissible, and that this appeal ought to be allowed.

There are two other matters to which I wish to refer. One is, whether one ought to say in all cases where the overseers have taken into consideration an agreed rent under an arrangement made by the occupier himself with the owner, that such evidence is too remote, and, therefore, not admissible. I cannot assent to the proposition that it is always too remote. It may be, if coupled with other evidence, very relevant indeed. On the other hand, I do not think that the bare proof of such rental having been agreed to by the occupier of the rateable hereditament is always relevant and always admissible. Obviously, if it is a rent fixed a long time ago, and you have no other evidence at all excepting the fact that such rent was fixed, say fifty years ago, it is not relevant, it is too remote, and nobody ought to take that fact into consideration. But if you add to that other facts, if you prove in the case of a commercial undertaking that the business, established in the year when the rent was fixed, had enormously increased and become very valuable, you might then

think that although the rent had been fixed a long time ago, it was not so remote that it was unjust to take it into consideration.

The other matter to which I wished to refer was this. In the course of the argument here it was said that in cases like *South Eastern Ry. Co.* v. *Dorking* (1), there always was evidence of some competitor who was willing to take the premises, and, therefore, when that is the case, it is quite true that the evidence of the agreed rent may be very material in assessing the value, and that those cases have no application unless there is competition. Now, there are two answers to that. One answer to that is *Reg.* v. *School Board for London* (2), which was cited to us, and shews that competition is not essential to the admissibility of the agreement fixing the rent. It was suggested that that decision was limited to cases where the occupier was a person carrying on a business in which there was no profitable occupation and no competitors. But, so far as I understand it, apart from this question and from any decision, it cannot be that personal competition is necessary to make out the relevancy of a fixed rent. There is another sort of competition, quite different from personal competition, which is present every time a commercial man hires a hereditament and takes it as a tenant. A commercial man has to ask himself, "Will this pay me?" and if he carries on his business properly he will, in addition to having a "prime cost book," also have an estimate what it will cost, and, on the other hand, what he expects to get. Under those circumstances I think we may assume in the case of this railway company (who had to consider whether or not it would pay them to pay certain interest or to raise the money to construct this link line) they must have asked themselves the question, "Aye or no? Will this pay me?" They did not want the competition of another line. Under those circumstances it is perfectly plain that in the case of this link line they could not for a moment have put down the actual receipts and expenses on this eight miles of line, and said to themselves, "These receipts, less these expenses, will make it worth our while to acquire this line, or to raise this money for the purpose of bringing into existence this line." They must have taken into consideration

(1) 3 E. & B. 491, (2) 17 Q. B. D. 738.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Vaughan Williams L.J.

other matters. There are no stations and no sidings; they did not expect to make profits in that way. What they obviously did ask themselves was, "Will the making of this link so increase the number of passengers travelling upon the main line as to make it worth our while to come under this obligation to pay this interest and thus to raise this money?" Under those circumstances, although the fact that they did raise this money at this rate of interest is not a measure of the rent which the hypothetical tenant would be likely to be willing to pay, it is obviously a matter of anticipated profit which really made it worth the while of the railway company to raise this money, and to raise it at this rate of interest. To my mind, the moment one adopts that line of cases which shew that you may take into consideration matters which the hypothetical tenant himself must reasonably be supposed to have taken into consideration, namely, the increased profit on the main line although outside the parish, it is plain we must support the decision of the Court of quarter sessions, who only included in their consideration relevant matters, and we cannot interfere with that decision because of any other method which would have been practicable, or even more general, in arriving at the result.

FARWELL L.J. It is not surprising that rating authorities find some difficulty in applying to railways the provisions of the Act of Elizabeth as expanded by the Parochial Assessments Act, 1836. Fifty-six years ago Lord Campbell protested and implored the Legislature to intervene; his voice was the voice of one crying in the wilderness, and I suppose ours would be equally ineffectual if we made the same appeal. The valuers, by rule of thumb, have succeeded in arriving at what Lord Watson calls certain formulæ of valuation, which assist them in the conclusion of fact at which they have to arrive. Some of those formulæ have come before the Courts, and have been determined to be not wrong; I use Lord Esher's phrase. The function of the Court is stated by Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead* (1) in a passage a little before that which the Lord Justice has read: "The thing that the

(1) [1901] A. C. 175, at p. 179.

Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they are to arrive at it, the question of fact is simple enough as stated." Then he quotes from s. 1 of the Parochial Assessments Act, 1836, and a little further down he says: "It is not a question of law at all; it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law; but that is where, instead of doing what the statute has directed them to do, the overseers, or those who were acting on behalf of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included." Now, amongst the formulæ mentioned by Lord Watson and used by valuators, there are two at any rate, and for anything I know there may be more. One is the so-called "parochial principle"; the other is evidence of enhancement of value by reason of the benefit accruing to the rest of the line outside the parish in which the rated property is situate. Neither is wrong. The question for us in this case is a simple one; it is, as stated by the special case, whether the mileage proportion of receipts should be the sole basis of valuation, or whether interest on the cost of construction of the line was a matter which the Court of quarter sessions were entitled to take into account as an element of calculation in ascertaining the rateable value.

This Court is asked to say that, in doing what they did, quarter sessions have included something which by law ought not to be included. One has therefore to look at the facts of the particular case. It is a small branch line about eight miles long, one mile of which is in the particular parish. It has no stations, no terminus, no sidings. It has been acquired and built, and was opened for traffic in 1900, that is four years before the special case was stated. It cost 280,000*l*. Is it possible for the Court to say that the rating authorities were wrong in taking into consideration the cost, and the interest on such cost, in ascertaining that which the hypothetical tenant (including amongst the class of hypothetical tenants this railway company) would be willing to give for something which is added on to its original railway

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Farwell L.J.

by way of an annexe to connect it with another main railway for the purpose of getting through traffic down to Southampton? Is it possible for us to say that is to be excluded altogether, and is a matter which should not have been taken into consideration at all? I have considered the special Act, and I think that in the hands of the Great Central Company this is a separate undertaking, an annexe to, and not an integral part of, the main line; so that for the purposes of this question we are dealing with a small, separate undertaking which the Great Central Railway has thought it worth its while to acquire, and to pay interest on the purchase money advanced by the Great Western Company for making it. If the question had been indeed that which the Divisional Court appear to have thought it was, I should agree with what the Lord Justice has said, that it would be obviously impossible to say that the rate of interest was conclusive as to the amount which the hypothetical tenant would pay. But that is not the question. The question is whether it is not a matter which they are entitled to take into consideration. In my opinion it is obviously such a matter, and I do not myself see that any injustice is done. Blackburn L.J., in *Reg.* v. *Llantrissant* (1), points out that "there is still left the apportionment amongst the several parishes about which our opinion is not asked." I understand him by that to be referring to what Wightman J. said in the case of *Reg.* v. *West Middlesex Waterworks* (2): "If a tenancy of each parochial part be assumed according to this hypothesis, then, although each parish rates separately upon its own estimate of the value of the part lying within it, and the law gives no power of making all the parishes co-operate in rating the several parts lying in each, nevertheless this Court is bound to protect the occupier of such an apparatus from being rated beyond the rateable value of the whole taken together." I will not stay to read the following two pages. It appears to me that it follows that if you take into consideration in rating in parish A, the enhanced value in parishes B, C, and D, in some way or other credit ought to be given for such value in parishes B, C, and D, and that I understand is what Wightman J. means. If so, no injustice is done to the railway company.

(1) L. R. 4 Q. B. 354. (2) 1 E. & E. 716, at p. 722.

Now Mr. Balfour Browne argued that it was necessary that the object of the occupier should be to make a profit out of the particular thing occupied. Assume that is so (although I do not think it is necessary), he makes the profit here by reason of the enhanced profits which he gets from the whole of his undertaking. If you once admit (as I think you are bound to admit, having regard to the cases to which the Lord Justice has already referred), that this question of enhanced profits is one of the formulæ which the valuers may take into consideration, obviously that is a matter which is germane to the subject. But in truth I see no reason why the same principles do not apply as applied in *Reg.* v. *School Board for London* (1), and in *Davies* v. *Seisdon Union* (2), which we had before us a week or two ago. The question is: What would it be worth the while of the hypothetical tenant to give for the year? You must take into consideration, for instance, not merely the question whether he is going to make a profit, because, ex hypothesi, in *Reg.* v. *School Board for London* (1), there was no profit to make. So in *Davies* v. *Seisdon Union* (2) there was no profit to make, but there were statutory duties to be performed which rendered it necessary for the authorities to incur the expense; and, as Lord Herschell pointed out, it was an element, although only an element, as appears in the passage in *London County Council* v. *Churchwardens, &c., of Erith* (3), which has been read to us. It is only an element to be considered, but still it is a consideration that if an authority is bound by law to provide something in the nature of a school, or something in the nature of a sewage farm, it is not an unfair thing to consider how much would they have given by way of rent if they had rented it—how much, as they have bought it themselves, ought you to consider to be the fair amount, having regard to what they thought it worth their while to pay for the land in question?

In the same way it appears to me that the same principles may be applied to the present case. We are considering simply this one question, whether the valuers are entitled to take into consideration, or bound to exclude, this question of interest on

(1) 17 Q. B. D. 738. (2) Ante, p. 630.
(3) [1893] A. C. 562, at p. 592.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Farwell L.J

a sum of money expended in constructing only four years ago this thing which is an annexe to and not an integral part of a railway. I do not think that a case where fifty years ago a large sum of money, whether by way of perpetual rent-charge, or by way of purchasing the land, was given, has any bearing on this. I express no opinion one way or the other, more than to say it would be impossible to consider as relevant what the company gave fifty years ago, whether it was given in money down or given by way of rent-charge or rental.

The result is that, in my opinion, this appeal ought to be allowed.

BUCKLEY L.J. I also am of opinion that this appeal ought to be allowed. I have listened with great interest, and I hope advantage, to the very able statement and analysis which Mr. Ryde has given the Court of a large number of authorities dealing with the question of the rating of railways. I am glad to think that it is not necessary for the decision of this case that we should endeavour to reconcile them, the more so because I find that a learned text-writer has said that he has found it a hopeless problem to do so.

The question we have to decide lies, I think, within a comparatively narrow compass. It is simply this: Whether the Court of quarter sessions were bound to take the mileage proportion of receipts as the sole basis of valuation, or whether they were right in holding that interest on the cost of construction of the line was a matter which they might also take into account. They thought that in the particular circumstances stated in the case interest on the cost of construction of the line was an element which might properly be taken into account in ascertaining the rateable value; that evidence as to that was evidence admissible before them to which they could have regard. I think they were right.

The particular circumstances stated in the case are, shortly, that on this link line there are no stations or sidings, that it does not originate any traffic, that the only advantage or use of this line to the Great Central and to the Great Western is during the existence of an agreement for mutual interchange of traffic, and

LIBRARY OF LONDON

that in the absence of such an agreement the line would be of no value. Let me state shortly two matters of principle which seem to me to lie at the root of this matter. The first is that the mode of arriving at the proper figure is a question of fact and not of law. Whether evidence was excluded improperly or included improperly is a question of law: but when you have ascertained that the evidence upon which the rating authority proceeded was evidence properly admissible, then the mode of assessment (by which I mean whether they were going to take what is called the parochial principle, or whether they were going to proceed upon the footing of a rent, or what circumstances in the facts of the case they considered dominant as determining them in arriving at the figure) is for them and not for us. Upon that I refer to two passages. I will not read them again, because they have been read already, namely, Lord Watson's words in *North and South West Junction Ry. Co.* v. *Brentford Union* (1) and Lord Halsbury's words in *Mersey Docks and Harbour Board* v. *Birkenhead.* (2)

The other point of principle is this: That assuming that the rating authority is going to proceed upon the parochial principle, thinking that to be the right one, still it remains that the rateable value within the parish may depend on matters outside the parish, that the rating authority may consider, and may properly come to the conclusion, that in applying the parochial principle it is not the earnings within the parish which conclude the matter, but that they are entitled to add in the facts of the case, that the land within the parish has a larger value, because it creates traffic and profit which arise outside the parish. For that I refer to four cases. The first is Lord Ellenborough's decision in the case of *Rex* v. *New River Co.* (3) He said this: "The property is locally valuable in the parish where it is rated although that value is derived from extrinsic circumstances, and although the profits are actually received elsewhere." The next is *Reg.* v. *London, Brighton and South Coast Ry. Co.* (4), where Coleridge J. says (dropping the words specified in the section which Mr. Ryde said created and which I agree create a difficulty): "The subject

(1) 13 App. Cas. at p. 594.
(2) [1901] A. C. at p. 180.
(3) 1 M. & S. 503, at p. 509.
(4) 15 Q. B. 313, at p. 360.

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Buckley L.J

is parochial. The inquiry is to be conducted by parochial authorities with limited powers. If any matters locally situated without the parish—that is, if any such affect the amount of the net annual value, or rent at which the same might reasonably be expected to let—they will of necessity fall within the range of the inquiry." The next is the language of Lord Campbell addressed, not to the subject of *profits* arising elsewhere, but to the subject of *expenses* incurred elsewhere—not the same thing, but a similar thing. Adopting the parochial principle upon which he is proceeding entirely, he says in *Reg.* v. *Great Western Ry. Co.* (1): "This principle does not preclude a consideration of charges and expenses *wherever arising locally*, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment." The last is the judgment of Lord Campbell, the most valuable, I think, of them all, in *South Eastern Ry. Co.* v. *Dorking* (2), which I am not going to read, because the President of the Court has read the substance of it already; but the reasoning of that judgment is this: That abiding, as he says he is going to abide, by the parochial principle, value in the parish may be enhanced by circumstances arising out of the parish: profit originating from occupation of land in the parish, but received from traffic outside the parish, is for the purposes of assessment to be attributed to the land from whose occupation it originates, and the profit being thus assessed in that parish there is to be a deduction made in respect thereof in assessing the other parts of the undertaking in other parishes.

Starting with those as matters of principle, how does this case stand? Every measure of rating, I take it, is based upon ascertaining the proper pecuniary measure of the beneficial occupation measured by the rent which the hypothetical tenant would pay. Take this particular eight miles of line. The beneficial occupation of these eight miles may be measured, not by the profits earned in this parish excluding other considerations, but by taking also into consideration the increase which its occupation creates in profits earned outside the parish. In other words, there may be taken into consideration its value as the creator of through traffic which, but for the occupation of this

(1) 15 Q. B. 1085, at p. 1090. (2) 3 E. & B. at pp. 514, 515.

land, would never come to this undertaking. In answering the question whether the facts are such as to lead to that conclusion, is, or is not, cost of construction to be excluded or the annual interest of money borrowed for the purposes of construction to be excluded? The cost of construction may be in the facts of any particular case immaterial, I agree. It may be wholly superseded by other and better materials, or it may be that, having regard to the other materials, the cost of construction, or interest upon money borrowed, or rent, may have some bearing but have but little bearing. All such considerations are for the rating authority. The only question for us is, whether it is material to which the rating authority may pay regard.

Take the particular facts of this case and let us see whether evidence as to the following facts would be admissible or not: 280,000*l.* was obtained for the purpose of the construction of this line, and the interest reserved upon that money produces an annual cost of 9800*l.* a year. Is it, or is it not, admissible to shew that that 280,000*l.* was borrowed at that expense, because this link line was valuable to the Great Central Railway Company above its mere local earning power, because of its capacity to stimulate and produce traffic which otherwise, so far as the Great Central Railway are concerned, would never have existed? Would the following have been relevant arguments to address to the rating authorities? Could the parish argue it was worth the company's while to come under liability to pay 9800*l.* a year to earn locally no more than, say, 500*l.* a year, because their profits outside the parish would be largely increased; and would it have been competent to the Great Central to reply, "You may say that, but we agreed to give that large sum of 9800*l.* a year because it was in perpetuity. If we had only got the subject-matter from year to year we should have given only a smaller sum"? It appears to me both arguments would be perfectly admissible. The question we have to consider is, not which of those two arguments would prevail, or what figure would result in the mind of the rating authorities, having regard to those arguments, but whether they were admissible at all. To my mind the evidence is plainly admissible evidence to which regard is to be had. The respondents contend before us that they ought

C. A. 1907

GREAT CENTRAL RAILWAY v. BANBURY UNION.

Buckley L.J.

to be rated on the footing of the profits attributable to the land in the parish. Suppose that the rating authority thought they were right in respect of that (which it would have been perfectly competent for them to do if that was their judgment upon the matter), this evidence, as it seems to me, is still admissible upon the application of the principle that rateable value within the parish, even if you are going to measure it on the parochial principle, may depend upon matters outside the parish. Upon that matter this question of what it was worth their while to pay for the getting of this eight miles is, to my mind, admissible evidence.

I think, therefore, that the Court of quarter sessions proceeded on the consideration of proper evidence; if they did, it is not for us to interfere. Upon these grounds I think this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Dixon H. Davies; Hopwood & Sons, for E. Lamley Fisher, Oxford.*

W. C. D.

RHONDDA URBAN DISTRICT COUNCIL *v.* TAFF VALE RAILWAY COMPANY.

1907

Feb. 14; *March* 1.

Bridge—Approaches—Public Carriage Road carried over Railway—Liability of Railway Company to widen—Railways Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 20), *ss.* 50, 51.

The liability imposed on railway companies by s. 51 of the Railways Clauses Consolidation Act, 1845, to widen any bridges carrying roads over railways where the width of the road has been increased "beyond the width of such bridge on either side thereof" does not extend to the approaches to the bridge.

Action tried before Phillimore J. without a jury.

The plaintiffs claimed: "(1.) A declaration that the defendants are bound forthwith at their own expense to widen to the width of twenty-five feet between the fences thereof the bridge erected by them for carrying the public carriage way over their Rhondda branch railway at a point immediately north of the defendants' Ystrad Station, together with the approaches to the said bridge, and to do all necessary acts and construct all necessary works to effect the widening of the said bridge and the approaches thereto as aforesaid. (2.) A mandamus commanding the defendants forthwith at their own expense to widen the said bridge and the approaches thereto to a width of twenty-five feet."

The following statement of facts is taken from the written judgment of the learned judge:—

"The bridge in question is a structure carrying a road first up an ascent to a bridge over the Ton River, then over that river towards another bridge over the railway and down a descent on the farther side. It is roughly about 100 yards long. On the north-western side it is the continuation of a short piece of road which branches from the Ystrad Road from Pontypridd to Treherbert. On the further side it is continued by Church Road in the village of Ystrad. The bridge was made by the defendant company under the powers given to them by the Taff Vale Railway Act, 1846. These powers included the diversion of the road and the river. It has been assumed that the whole thing took place shortly after the passing of the Act. The old

1907

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

road was of the description called a public carriage road in the Railways Clauses Act. It was circuitous and narrow, probably not more than twelve feet wide in places. The new road over the bridge is of a width of about eighteen feet, widening down the descent towards Church Road.

"Since the bridge was made Church Road has been widened to a width exceeding twenty-five feet, but the distance between the bridge proper over the railway down the descent to Church Road is more than fifty yards before the widened Church Road is reached. At the other end the piece of road branching from the Ystrad Road has also been widened to an extent exceeding twenty-five feet, and the widening has taken place since the bridge was made. The fact was controverted, but I find as I have said." (1)

(1) By the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 50: "Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations; . . . .

"The road over the bridge shall have a clear space between the fences thereof of thirty-five feet if the road be a turnpike road, and twenty-five feet if a public carriage road, ..."

By s. 51: "Provided always, that in all cases where the average available width for the passage of carriages of any existing roads within fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet: provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in the like case over or under the railway."

By the Taff Vale Railway Act, 1836 (6 & 7 Will. 4, c. lxxxii.), s. 69: "Where any bridge shall be erected for carrying any turnpike road, public highway or occupation road over the said railway, the road over such bridge shall be formed and shall at all times be continued of such width as to leave a clear and open space between the fences of such road of not less than twenty-five feet for the purpose of a turnpike road and for the purposes of

Lush, K.C., and *Bailhache* (*Trevor Lewis* with them), for the plaintiffs. The defendants are bound under ss. 50 and 51 of the Railways Clauses Act, 1845, to widen both the bridge and the approaches. The approaches are part of the bridge: *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1); *Rex* v. *Staffordshire and Worcestershire Canal Co.* (2) The roadway over the bridge is part of the bridge: *Lancashire and Yorkshire Ry. Co.* v. *Mayor, &c., of Bury* (3); and the approaches must be regarded in the same way. The approaches are so treated in s. 46 of the Railways Clauses Act and at common law and under the Statute of Bridges: *Rex* v. *West Riding of York.* (4) If the approaches are not widened it will be useless to direct the defendants to widen the bridge.

Levett, K.C. (*J. G. Wood* and *Vernon-Harcourt* with him), for the defendants. The Railways Clauses Act in s. 46 distinguishes "approaches" from bridge, and s. 50 speaks of "the road over the bridge," which clearly does not include "approach." There is no provision for widening approaches, and the company have no power to do so, as they do not own the land on either side of the approaches, nor can they acquire it compulsorily. There is no authority for saying that "bridge" includes approach. *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and *Rex* v. *Staffordshire and Worcestershire*

---

any public highway or occupation road of not less than fifteen feet."

By the Taff Vale Railway Act, 1846 (9 & 10 Vict. c. cccxciii.), s. 1 (after reciting, inter alia, the Taff Vale Railway Act, 1836), "all the provisions contained in the said recited Acts relating to the Taff Vale Railway so far as the same are now in force and except such of them as are inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, and except also such as by this Act are altered or otherwise provided for shall extend to this Act and to the several purposes thereof as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes."

By s. 3 "all the provisions of . . . . the Railways Clauses Consolidation Act, 1845, so far as the same are applicable, and save in so far as the same may be inconsistent with the provisions hereinafter mentioned, shall extend to this Act and to the several purposes thereof, and the same, together with this Act, shall be read as one Act."

(1) (1894) 71 L. T. 430.

(2) (1901) 65 J. P. 505.

(3) (1889) 14 App. Cas. 417.

(4) (1806) 7 East, 588.

1907

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

Canal Co. (1) turned on the particular words of the Act in each case, which were held wide enough to include approaches. In other cases it has been held that the railway company need not widen approaches: *Reg.* v. *Birmingham and Gloucester Ry. Co.* (2); *Reg.* v. *London and Birmingham Ry. Co.* (3) The rule laid down by the Statute of Bridges has no application where the liability is imposed by a later statute: *Hertfordshire County Council* v. *New River Co.* (4)

Secondly, the width of roads over bridges is provided for by s. 69 of the Taff Vale Railway Act, 1836; and s. 50 of the Railways Clauses Consolidation Act, 1845, has no application. That section only applies "except as otherwise provided by the special Act," and the Taff Vale Railway Act, 1846, under which the bridge in question was made, incorporated by s. 1 the Taff Vale Railway Act, 1836.

Lush, K.C., in reply. Sect. 2 of the Railways Clauses Consolidation Act, 1845, defines the expression "the special Act" as used in the Act as meaning "any Act which shall hereafter be passed authorizing the construction of a railway and with which this Act shall be so incorporated as aforesaid." The Act of 1836, therefore, which was passed before the Railways Clauses Consolidation Act, 1845, has no application here.

Cur. adv. vult.

March 1. PHILLIMORE J. read the following judgment:—In this case the plaintiff council relies upon the latter half of s. 51 of the Railways Clauses Act, 1845, and seeks a declaration that the defendant company is liable to widen a bridge carrying a highway over the railway to the width of twenty-five feet between the fences. The plaintiff council further claims consequential relief. Most of the facts are not in dispute. The following statement comprises the material facts, those which are in dispute being found by me as I proceed to state them. [The learned Judge then stated the facts as above set out, and proceeded:—] The plaintiff council, desiring by reason of the great increase of the population to

(1) 65 J. P. 505.
(2) (1841) 2 Q. B. 47.
(3) (1839) 1 Rail. Cas. 317.
(4) [1904] 2 Ch. 513.

have the bridge widened, has a prima facie right to this widening. Prima facie the road, which in ordinary circumstances should have been twenty-five feet wide, was permitted to be narrower under the provision of s. 51 of the Railways Clauses Act, and now that "the average available width" of the road "within fifty yards of the points of crossing the same" has been increased, the plaintiff council is entitled to have the width of the road over the bridge increased to twenty-five feet. The expression "points of crossing the same" is difficult to understand, possibly because s. 51 is intended to deal compendiously both with roads carried over railways and with railways carried over roads. The use of the plural "points" is also puzzling. I think the explanation is that it repeats the plural "existing roads," and that the draughtsman was thinking of all the roads which the railway would intersect in its course, and that there is only "one point of crossing" for each several road, that point being the area common to road and railway or, if a mathematical point be meant, the central point of that area. No construction, however, has been suggested which would affect the decision in this case if it be held that a duty to widen to twenty-five feet arises where the road approaching the bridge at one end is widened though the road at the other end remains narrow. That the duty so arises was hardly disputed, and I so decide.

Two points of law were taken in answer to this prima facie claim—the first as an answer to the whole claim; the second as an answer to that part of it which requires the defendant company to widen the ascent, the bridge over the river, the piece (if there be any, of which I am not sure) connecting the two bridges, and the descent.

The first point is thus stated. Sect. 51 of the Railways Clauses Act says that the width to which a road is to be widened is that prescribed as the maximum width by the special Act, and the maximum width prescribed by the special Act in this case is that prescribed by s. 69 of the Taff Vale Railway Act, 1836, namely fifteen feet. So, as the road is already eighteen feet there need be no further widening.

Now the words "special Act" in the Railways Clauses Act mean a future special Act, and the Act of 1836 is a past Act. The special Act in this case is the Taff Vale Railway Act of 1846,

1907

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

Phillimore, J.

so the efforts of the defendants have been directed to shew that the material clauses of the Taff Vale Railway Act, 1836, have become incorporated into, and are to be taken as part of, the Taff Vale Railway Act, 1846.

Such an incorporation is not, I think, probable. The Railways Clauses Act is intended to provide a code of general regulations, some of them, at any rate, in advance of those which used to be found in special Acts. They are to be universally applicable unless some very special cause to the contrary exists, and the special exemption is to be brought to the special notice of Parliament. It is contemplated that every future special Act shall incorporate the general Act; and it is not contemplated that the provisions of the general Act shall be defeated by a past special Act. But though this construction is improbable, still it is possible. Therefore ss. 1 and 3 of the Taff Vale Railway Act, 1846, must be examined with some care.

Sect. 1 incorporates, among other Acts, the Taff Vale Railway Act, 1836, except in so far as its provisions are inconsistent with (inter alia) the Railways Clauses Act, and except such as by this Act are altered or otherwise provided for. Sect. 3 incorporates the provisions of (inter alia) the Railways Clauses Act, 1845, "so far as the same are applicable, and save in so far as the same may be inconsistent with the provisions hereinafter mentioned."

The provisions of the Railways Clauses Act, 1845, s. 50, generally requiring that a public carriage road shall be twenty-five feet broad are inconsistent with the provisions of the Taff Vale Railway Act, 1836, making it enough to have such a road fifteen feet wide. But it is said that s. 50 is qualified by the words "except as otherwise provided by the special Act." This is true; but the special Act is not the Taff Vale Railway Act, 1836, because it is a past Act. Therefore the qualification in s. 50 does not attach, and the provisions in the Taff Vale Railway Act, 1836, as to the width of a public carriage way are inconsistent with those of the Railways Clauses Act, and therefore are not incorporated by s. 1 into the Taff Vale Railway Act, 1846. On the other hand, s. 50 of the Railways Clauses Act is by s. 3 incorporated into the Taff Vale Railway Act, 1846, because there are no "provisions thereinafter mentioned" in that Act which are inconsistent with s. 50 of the

Railways Clauses Act. Lastly, these provisions of the Railways Clauses Act are not by the Taff Vale Railway Act, 1846, "altered or otherwise provided for." Therefore the defendants' first point and the defence to the whole action fails.

On the second point either side has pressed me with the supposed inconvenience and absurdity which will result from the opposite construction. It is contended on behalf of the plaintiff council that it would be absurd to limit the widening to the bridge and leave the approaches narrow. As to this, it may be observed that in the converse case the Court of Queen's Bench thought it reasonable to require a wide approach though the bridge was left narrow: *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1) On behalf of the defendant company it is pointed out that it has not the land on either side of the approaches and has now no power of getting it by compulsion, if at all, and that it cannot widen the approaches unless it gets the land. This seems to me a very strong objection. If the plaintiff council desire to widen the whole piece of road it can acquire the necessary land by provisional order, and thus more easily, and perhaps more cheaply, than the defendant company could. It will then have two advantages—(1.) as far as the bridge proper is concerned, the defendant company cannot oppose; (2.) as far as the bridge proper is concerned, the cost would be borne by the defendant company. I have read the cases cited to me, and on the whole they rather assist me to the conclusion, to which I am also led by the language of the Railways Clauses Act and by the reason of the thing, that the liability of the railway company is limited to the widening of the bridge proper.

I will therefore make a declaration in terms of paragraph 1 of the plaintiffs' claim, omitting the words "together with the approaches to the said bridge" and the words "and approaches thereto."

I am asked also to order a mandamus. To this I see several objections; and moreover, now that I have determined that the liability of the defendant company is limited to the widening of the bridge proper, I do not propose to do anything to compel this, unless and until the plaintiff council is ready to widen the rest.

(1) 2 Q. B. 47.

1907

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

I will, however, give liberty to apply, and I give the costs to the plaintiff council.

Judgment accordingly.

Solicitors for plaintiffs: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

A. P. P. K.

C. A.

1907

Feb. 1, 2; *Mar.* 1.

[IN THE COURT OF APPEAL.]

MOULIS *v.* OWEN.

Gaming and Wagering—Gambling in a Foreign Country—Loan—Cheque—Consideration—"Deemed to be illegal"—Gaming Act, 1710 (9 *Anne*, *c.* 14), *s.* 1—*Gaming Act*, 1835 (5 *& 6 Will.* 4, *c.* 41), *s.* 1.

The defendant gave to the plaintiff in Algiers a cheque drawn by him on an English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to play at baccarat in a club at Algiers, and, as to the balance, to be applied by the plaintiff in discharging debts incurred by the defendant when playing at baccarat in the club. The consideration for the cheque was legal according to the law of France. In an action on the cheque:—

Held, by Collins M.R. and Cozens-Hardy L.J. (Fletcher Moulton L.J. dissenting), that, inasmuch as the transaction was governed by English law, the cheque must be deemed to have been given for an illegal consideration within s. 1 of the Gaming Act, 1835, and that the action was, therefore, not maintainable.

Robinson v. *Bland*, (1760) 1 W. Bl. 234, 256; 2 Burr. 1077, followed.

King v. *Kemp*, (1863) 8 L. T. 255, not followed.

APPLICATION by the defendant for judgment or a new trial in an action tried by Darling J. and a common jury.

The plaintiff was the secretary of a club at Algiers, and the action was brought on a cheque given to the plaintiff by the defendant at Algiers. The cheque, which was drawn in English on an English bank and was stamped with an English stamp, was given partly in return for money advanced by the plaintiff to the defendant for the purpose of playing at baccarat in a club at Algiers, and partly to be applied by the plaintiff in payment of a sum won from the defendant by divers persons when playing at

baccarat in the club. It was admitted at the trial that baccarat is not an illegal game in Algiers, and that the consideration for the cheque was valid according to the law of France.

No evidence was called on behalf of the defendant, but it was contended that the action could not be maintained.

Darling J. directed the jury to find a verdict for the plaintiff, and, after argument on the question of law, entered judgment for the plaintiff.

Schwabe, for the defendant. The question whether this action can be maintained must be determined according to English, and not French, law. Where a contract is made in one country to be performed in another, prima facie the lex loci contractus prevails, but it is otherwise if from all the circumstances the Court can infer that the parties intended that the transaction should be governed by the law of the country where the contract was to be performed. This cheque was no doubt given in Algiers in payment of a debt incurred in Algiers, but it was an English cheque drawn on an English bank, with an English stamp, and it is payable in England. The inference to be drawn from these facts is that it was the intention of the parties that the validity of the cheque should be governed by English law: *Robinson* v. *Bland* (1); *In re Missouri Steamship Co.* (2); *Lloyd* v. *Guibert* (3); *Chatenay* v. *Brazilian Submarine Telegraph Co.* (4); *Rothschild* v. *Currie* (5); *Jacobs* v. *Crédit Lyonnais* (6); *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega* (7); Byles on Bills, 16th ed. p. 382. By English law this action, which is an action on a cheque given in respect of money lost at gaming and money lent for the purpose of gaming, cannot be maintained, for by s. 1 of the Gaming Act, 1835 (amending 9 Anne, c. 14, s. 1 (8),

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.
(2) (1889) 42 Ch. D. 321.
(3) (1865) L. R. 1 Q. B. 115.
(4) [1891] 1 Q. B. 79.
(5) (1841) 1 Q. B. 43.
(6) (1884) 12 Q. B. D. 589.
(7) [1902] 2 K. B. 384.
(8) The Gaming Act, 1710 (9 Anne, c. 14) (9 Anne, c. 19, in the Revised Statutes), s. 1: "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming or playing at

C. A. 1907

MOULIS v. OWEN.

the cheque must be deemed to have been given for an illegal consideration.

The statute of Anne does not deal with the question of the legality or illegality of gaming, nor does that Act or any other Act make the game of baccarat illegal. The Act is directed solely to the avoidance of securities given for gambling debts; and the Gaming Act, 1835, does not say that securities so given are illegal, but that they shall be deemed to have been given for an illegal consideration. There is nothing of a local character about these enactments, and the operation of the Gaming Act, 1835, is not confined to securities given in respect of gambling in England. For the purpose of deciding this case it is, therefore, immaterial whether gaming is legal or illegal in Algiers. *Robinson* v. *Bland* (1) is a distinct authority in favour of the defendant. The action there was on a bill of exchange given in Paris by Sir John Bland (whose administratrix was the defendant) for money lent to him at play and for money lost by him at play. It was held that the statute of Anne was a good defence to the action on the bill of exchange, although the gaming had taken place abroad. The Court, however, held that the plaintiff could succeed on the count for money lent, since the statute only avoided the security and not the contract. Since the passing of the Gaming Act, 1835, this distinction no longer exists, and if it were material it would be submitted that

---

cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play, so play or bet, shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever. . . . ."

By the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 1, it is enacted that so much of 9 Anne, c. 14, s. 1, "as enacts that any note, bill or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill or mortgage which if this Act had not been passed would, by virtue" of 9 Anne, c. 14, s. 1, "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.

in the present case the plaintiff could not recover for money lent: *M'Kinnell* v. *Robinson* (1); *Applegarth* v. *Colley*. (2) The contrary expression of opinion in *Quarrier* v. *Colston* (3) is in conflict with those decisions. But it is not necessary in the present case to say whether an action will lie in this country for money lent abroad for the purpose of gaming, because here the plaintiff sues on the cheque only. The only authority against the defendant is *King* v. *Kemp* (4), which was a nisi prius decision of Willes J.; but the report is extremely short, no reasons are given for the decision, and neither the statutes nor *Robinson* v. *Bland* (5) appear to have been cited. The case cannot, therefore, be regarded as an authority. On the other hand, *Robinson* v. *Bland* (5) was cited with approval by Fry L.J. in *In re Missouri Steamship Co.* (6)

E. Todd, for the plaintiff. The decision of Darling J. was right. It being admitted that this action could have been maintained according to the law of France, the plaintiff is entitled to recover in this country. *Quarrier* v. *Colston* (3) shews that an action can be successfully brought in England in respect of a gaming debt incurred abroad in a country where the gaming is legal, and that there is no distinction between an action on the original consideration and an action on the security. *Quarrier* v. *Colston* (3) must be taken to have overruled Lord Mansfield's expression of opinion in *Robinson* v. *Bland* (5); Foote's Private International Jurisprudence, 3rd ed. p. 385; Westlake's Private International Law, 4th ed. p. 284. *King* v. *Kemp* (4) is a decision in the plaintiff's favour directly in point, and, coming after *Quarrier* v. *Colston* (3), is a stronger authority than *Robinson* v. *Bland*. (5) If the question has to be decided on the language of the Gaming Act, 1835, the word "illegal" in s. 1 must mean illegal according to the law of the place where the security was given, for any other interpretation involves the assumption that the Legislature was purporting to deal with acts done by foreigners in their own country. The statutes of Anne and

(1) (1838) 3 M. & W. 434.
(2) (1842) 10 M. & W. 723.
(3) (1842) 1 Ph. 147.
(4) 8 L. T. 255.
(5) 1 W. Bl. 234, 256; 2 Burr. 1077.
(6) 42 Ch. D. at p. 340.

C. A. 1907

MOULIS v. OWEN.

William IV., like all the previous legislation on the subject of gaming, were intended to cure certain mischiefs which were occurring in England, and the "gaming" referred to means gaming in England and nowhere else. An Act of Parliament is never construed as applying to foreign countries unless the contrary intention is clearly expressed. Therefore, assuming that the case must be decided by English law, there is nothing in that law to prevent the plaintiff from recovering. But if the plaintiff cannot recover on the cheque, it is clear that an action would lie for money lent, and the plaintiff ought in the circumstances to be allowed to amend his claim: *Ex parte Pyke, In re Lister*. (1)

Schwabe, in reply. *Quarrier* v. *Colston* (2) is not in point, for the action was not on a security given for money lent for the purpose of gambling. [He referred to Westlake's Private International Law, 4th ed. p. 280.]

Cur. adv. vult.

March 1. COLLINS M.R. read the following judgment:—This is an appeal by the defendant from a verdict and judgment directed by Darling J. for the plaintiff at the trial. The action is brought on a cheque given by the defendant to the plaintiff in the French colony of Algiers. The cheque was given partly in return for money advanced by the plaintiff to the defendant at a gaming-house or club in Algiers for the purpose of gaming, and partly to be applied by the plaintiff in payment of an amount won from the defendant by divers persons at play in the said house. We are told, though it has not found its way into the learned judge's note, that it was admitted at the trial that such a consideration would be valid in France. The cheque was drawn in English upon a London bank. The case, therefore, of *Robinson* v. *Bland* (3) is directly in point so far as the action on the security is concerned, and here the action is on the cheque only, and not upon the consideration. Lord Mansfield and his colleagues there held that the law to be applied was the law of the place where the bill was payable, and, therefore, as the bill

(1) (1878) 8 Ch. D. 754. (2) 1 Ph. 147.
(3) 1 W. Bl. 234, 256; 2 Burr. 1077.

was made payable in England, "it was entirely an English transaction," and to be governed by the law of England. The Court had no hesitation, therefore, in holding that the statute 9 Anne, c. 14, was an answer to an action on the bill. Lord Mansfield treats it as clear that all bills of exchange on a gaming consideration are void under that statute. I cannot find that the decision in that case, so far as it dealt with the bill as distinguished from the consideration, has ever been questioned. On the other hand, the principle involved therein has been approved as recently as 1889 in the Court of Appeal in the case of *In re Missouri Steamship Co.* (1); see particularly per Fry L.J. (2); and the leading text-writers treat it as good law: see Dicey's Conflict of Laws, ed. of 1896, p. 553, and in numerous other places; Westlake's Private International Law, 4th ed. pp. 280, 284; Pollock on Contracts, 7th ed. p. 391, and other places. On the other hand, the distinction made between the security and the consideration, resting, as it did, on earlier decisions, has been subsequently modified by later cases and the statute 5 & 6 Will. 4, c. 41: see *Applegarth* v. *Colley*. (3) In that case the Court say (4), after reviewing the previous authorities: "We assume, therefore . . . . that the statute of Anne in connection with the 5 & 6 Will. 4, c. 41, must be taken to avoid all contracts for the payment of money won at play." In *Quarrier* v. *Colston* (5), decided by Lord Lyndhurst in 1842, it was held that money lent abroad and applied by the borrower in gambling, and also money won not exceeding 10*l.* at any single sitting, could be recovered in England. This case relates to the consideration only, and from what appears in the statement of facts there was nothing to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson* v. *Bland* (6) from the fact that an English bill was given. It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England,

(1) 42 Ch. D. 321.
(2) Ibid. at p. 340.
(3) 10 M. & W. 723.
(4) Ibid. at p. 732.
(5) 1 Ph. 147.
(6) 1 W. Bl. 234, 256; 2 Burr. 1077.

C. A 1907

MOULIS v. OWEN.

Collins M.R.

the security cannot be enforced in England. It was only by dissevering the rights on the security itself from those in respect of the consideration that Lord Mansfield drew the inference that the rights on the security were to be ascertained by English law, whereas no such inference arose as to the consideration. It seems quite clear that the claim on the security was decided without any reference to French law, which in that part of the case he deals with only parenthetically. After the passage above cited as to the invalidity under the statute of Anne of all bills given on a gaming consideration, he adds (1): "And (by the way) the fact is not found whether, even in France, you may not enter into and contemplate the consideration of a gaming note. I rather think you may. However, it is clear that in England the writing, as a writing, is void." It is only later on when he deals with the claim on the consideration for money won that he relies on the identity of the law of England with that of France in this respect. The decision, therefore, in *Quarrier* v. *Colston* (2) in no way assists the respondent in this case, which turns on the validity of the cheque only.

If the statute of Anne was an answer to a claim on the bill in the time of Lord Mansfield, it is certainly equally so now, since all that part of the statute has been repealed which might have been relied upon as limiting its operation exclusively to transactions taking place in England. Sect. 15 of 8 & 9 Vict. c. 109 repeals the Act of 16 Car. 2, c. 7, to which the statute of Anne was said to refer. It also repeals so much of 9 Anne, c. 14, as was not altered by 5 & 6 Will. 4, c. 41. One case only has been called to our attention which might seem to be inconsistent with *Robinson* v. *Bland* (3), viz., *King* v. *Kemp*. (4) This case purports to be a report of a nisi prius decision of the late Sir James Shaw Willes, but it bears on its face clear evidence of inaccuracy. It is quite impossible to suppose that that very eminent judge would have consulted his brother judges on a question of fact, viz., what was the law of France. If, on the other hand, it could be treated as a question of law, it

(1) 1 W. Bl. at p. 259.
(2) 1 Ph. 147.
(3) 1 W. Bl. 234, 256; 2 Burr. 1077.
(4) 8 L. T. 255.

could only be because it had been decided in *Robinson* v. *Bland* (1), but in a contrary sense to that which the judges are reported to have agreed upon. The case, therefore, as reported, is clearly of no authority. It would seem that it is not accurate even in the names of counsel. The present Lord Justice R. Vaughan Williams was not then (May, 1863) called to the Bar. In this state of the authorities I am certainly not prepared to differ from *Robinson* v. *Bland*. (1)

There is, however, yet another and, in my opinion, conclusive objection to the claim on the cheque in this case, viz., the joint operation of the Gaming Acts, 1845 (8 & 9 Vict. c. 109), s. 18, and 1892 (55 & 56 Vict. c. 9), s. 1. The effect of these enactments is that, whether the consideration of the cheque was partly moneys won from the defendant or partly the undertaking by the plaintiff to pay these sums to the winners, reimbursing himself out of the cheque, the contract would be one "rendered null and void by 8 & 9 Vict. c. 109, and no action shall be brought or maintained to recover any such sum of money." This provision, as Mr. Dicey points out in his reference to *Quarrier* v. *Colston* (2), is now part of the lex fori going ad litis ordinationem, and would now be an answer to any action brought in England on one part of the claim in that case, which arose before the earlier Act came into force: see Dicey's Private International Law, ed. of 1896, pp. 556 and 713 et seq. As the action here is on a cheque, the objection to part of the consideration is an answer to the entire claim: see Byles on Bills, 16th ed. p. 170. I think the facts are sufficiently set out in the pleadings and particulars to raise this defence. In my opinion the appeal must be allowed. I am certainly not prepared to allow an amendment at this stage of the case.

COZENS-HARDY L.J. read the following judgment:—The question in this appeal is whether the plaintiff is entitled to maintain an action upon a cheque, given to him by the defendant in Algiers, drawn upon a London bank and payable in London, such cheque being given to secure money lent by the plaintiff to the defendant

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.

(2) 1 Ph. 147.

C. A. 1907

MOULIS v. OWEN.

Cozens-Hardy L.J.

for the purpose of gambling. It was assumed in the Court below, and must be taken to have been admitted, that by the law of France such a debt is valid, and that an action could be maintained in France either in respect of the original consideration or in respect of the security given for it; but it is urged that by the law of England no action can be maintained on the cheque, because of the express language of the statute 9 Anne, c. 14, which made such a cheque "utterly void, frustrate, and of none effect." This portion of the statute is still operative, except that under the Gaming Act, 1835, the cheque is now to be deemed to have been drawn and given for an illegal consideration instead of being void. All the rest of the statute of Anne was repealed in 1845. The statute of Anne was interpreted in the case of *Robinson* v. *Bland* (1), which was twice argued, and is best reported in Sir William Blackstone's Reports, vol. 1, pp. 234 and 256. There a bill, payable in England, was given in Paris partly for money lent there by the plaintiff to Sir John Bland and partly for money lost at the same time and place by Sir John Bland to the plaintiff. It was there admitted that money lent to play with at the time and place of play might be recovered in France as a debt in the ordinary course of justice, there being no positive law against it. The Court, presided over by Lord Mansfield, held that no action could be maintained on the bill by reason of the statute of Anne, but that the money lent, as distinct from the money lost, might be recovered on the original consideration. It was there argued with great force that the statute of Anne, from its very nature, was addressed only to gaming within the realm and did not touch gaming abroad (2); but this contention did not prevail. Lord Mansfield seems to have based his decision, not on the ground that the statute applied to gaming in France, but on the special ground that, from the form of the bill, the local law of England must govern the transaction. He said (3): "The general rule established ex comitate et jure gentium is that the place where the contract is made, and not where the action is brought, is to be considered in expounding

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.

(2) 1 W. Bl. at pp. 240, 257.

(3) Ibid. at p. 258.

and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom. Huberus says (Præl. 1, tit. 3, p. 34) contracts are to be considered according to the place wherein they are to be executed. As, therefore, the bill in the present case is made payable in England, it is entirely an English transaction and to be governed by the local law. . . . . Now it is clear, that by the statute of Anne, all bills of exchange upon a gaming consideration are void. . . . . It is clear that in England the writing, as a writing, is void." I am not satisfied that he would have arrived at the same conclusion if Sir John Bland had given, not a bill payable in England, but a money bond not prescribing any place for payment. It seems to me that this decision must be equally applicable in interpreting the Act of 1835, which only varies the penalty, but does not enlarge or reduce the number of transactions affected by it. Unless, therefore, this part of the judgment in *Robinson* v. *Bland* (1) has been overruled by subsequent decisions, it seems directly in point.

The course of decisions has been remarkable. It was finally decided that the statute of Anne not only avoids a gaming security, but also, by necessary implication, the contract as well as the security: *M'Kinnell* v. *Robinson* (2); *Applegarth* v. *Colley*. (3) This apparently is inconsistent with the part of *Robinson* v. *Bland* (1) which gave judgment for the plaintiff to the extent of the money lent, but it does not directly touch the other part of the judgment. In *Quarrier* v. *Colston* (4) Lord Lyndhurst, while adhering to the view that money lent to play an illegal game could not be recovered, held that money lent at Baden Baden for the purpose of play could be recovered in England, the public gaming tables being lawful in Germany. It is argued that the debt and the security must stand or fall together, and that *Quarrier* v. *Colston* (4), which is the final decision on the point, is binding upon this Court, and that we ought to hold that the security is not hit by the Act of 1835.

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.

(2) 3 M. & W. 434.

(3) 10 M. & W. 723.

(4) 1 Ph. 147.

C. A. 1907

MOULIS v. OWEN.

Cozens-Hardy L.J.

After considerable hesitation I have arrived at the conclusion that this argument ought not to prevail. In *Quarrier* v. *Colston* (1) there was no security, there was nothing upon which the Act of Anne or the Gaming Act, 1835, could operate. There was nothing but a parol contract, which was evidenced by an I.O.U. Lord Lyndhurst's judgment does not govern the present case, although it leads to the strange result that a parol contract made in France may be valid if there is no security given for the loan, although, if there is a security by way of negotiable instrument payable in England, both the security and the debt are bad.

If the point decided in *Quarrier* v. *Colston* (1) should come for review, as it might have done if the plaintiff had sued, not upon the cheque, but upon the original consideration, it might be necessary to consider how far Lord Lyndhurst's judgment is consistent with subsequent decisions, such as *Rousillon* v. *Rousillon* (2) and *Kaufman* v. *Gerson.* (3) It may be that on grounds of public policy the Courts of this country ought to refuse to enforce a gaming contract, even though valid according to the law of the country where it was made. But it is not necessary for us to express any opinion upon this difficult question. I am not aware that the passage from Lord Mansfield's judgment, to which I have referred, has ever been dissented from. It is quoted with approval by Fry L.J. in *In re Missouri Steamship Co.* (4), and, so far as my searches have gone, it is adopted by the leading text-writers. This being so, I think we ought to follow it in the present case. Darling J. felt himself bound by *King* v. *Kemp* (5), a nisi prius case decided in 1863 by that great judge Willes J. But the only note of that case is so brief and so obviously unsatisfactory that I do not feel able to rely upon it. I regret that our efforts to ascertain the precise circumstances of that case have failed. The result is that, in my opinion, the lex loci solutionis must be applied to this cheque, and the transaction must be treated as wholly subject to our local law. In my opinion this appeal must be allowed.

(1) 1 Ph. 147.
(2) (1880) 14 Ch. D. 351.
(3) [1904] 1 K. B. 591.
(4) 42 Ch. D. 321, at p. 340.
(5) 8 L. T. 255.

C. A. 1907

MOULIS v. OWEN.

FLETCHER MOULTON L.J. read the following judgment:—This case raises a point which is extremely difficult to decide, by reason of the unsatisfactory state of the authorities bearing upon it; and I regret to say that I have come to a different conclusion from my learned brethren with regard to it. The facts of the case are very simple. The action is brought upon a cheque drawn by the defendant on an English bank in favour of the plaintiff, and given wholly or partly to repay money lent by the plaintiff to the defendant for the purpose of playing baccarat at Algiers, and during the continuance of such play. The defendant does not raise any question as to the money having been actually lent to him, nor deny that it constitutes a valid debt according to French law, but he relies solely on two English statutes—namely, 9 Anne, c. 14, s. 1, and 5 & 6 Will. 4, c. 41, s. 1—by the conjoint operation of which he alleges that the Court is bound to treat the cheque as given for an illegal consideration, and therefore unenforceable in the hands of the payee. The ground on which he alleges that the cheque comes within the purview of these statutes is that the money was knowingly lent or advanced for the purpose of betting or gaming, or lent and advanced at the time and place of play to the defendant who was gaming or betting—the game in question being a game at cards. There is no doubt whatever as to what law governs the case. The plaintiff has come to an English Court to enforce the payment of an English cheque, and beyond all controversy the matter must be governed by the English law relating to cheques. It seems to me quite immaterial whether we look on this as being an instance of the application of the lex fori or of the lex loci solutionis, insomuch as the consequences are the same. It is only in this respect that *In re Missouri Steamship Co.* (1) is relevant. But we must be careful that, while obeying this principle, we do not permit ourselves unconsciously to alter the law which we propose to apply. For instance, suppose there is a statute which makes tobacco growing in England illegal. A cheque for money knowingly given for the purpose of tobacco growing in England would be invalid, inasmuch as it would be for money provided for an illegal object. But an English cheque given for tobacco growing in

(1) 42 Ch. D. 321, at p. 340.

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

France would not be invalid, because the English law which has to be applied does not render tobacco growing outside the realm illegal, but only applies to tobacco growing within the realm. Similarly with gaming. If upon the true construction of the English law relating to gaming, the prohibitions and disabilities relate to gaming wherever it is carried on, there can be no doubt that the defence in the present case is a good one. But if under the true construction of the English law these prohibitions and disabilities only apply to gaming within the realm, the fact that English law governs the present case does not affect in any way the validity of the cheque sued upon. The decision of the question involved in the case turns solely on the view which we take on this point. It involves, however, a question of the interpretation of statutes, which is surrounded by great difficulties, and to lay the foundation for our decision it is necessary to examine the position of gaming contracts at common law and the treatment they received in the earlier as well as in the more recent statutes, as otherwise it is impossible to apprehend the effect of the authorities bearing on the matter.

Neither games nor gaming were in any wise illegal at common law, and a bet was in olden times a valid contract and would be enforced by the Courts. Juridically speaking, there is no reason why this should not be so. The reciprocal liability of the parties constitutes good consideration both on the one side and on the other, and differs in no substantial respect from the reciprocal liability arising from a wager on a past event the result of which is unknown to the parties wagering. Wagers of this latter kind were frequently enforced by our Courts—see, for example, *Good* v. *Elliott* (1)—prior to the Gaming Act, 1845. The ground for treating gaming contracts in an exceptional way is to be sought in reasons of public policy and not in any defect in the essential qualities of the contracts themselves, and it is clear that the necessity for so doing was not felt in the ages during which our common law was formed, so that the disabilities under which such contracts labour are entirely derived from statute law. From very early times we find legislation dealing with the subject of the legality of games and gaming, but the earlier

(1) (1790) 3 T. R. 693.

statutes have no reference to gaming contracts, but are directed solely to the suppression of games—mainly games of skill—and were based on the principle that they tended to displace practice at archery and like manly sports, which tended to render the people more fit for service in war. The earliest statute of this kind which I have found is 12 Rich. 2, c. 6, which was rendered more drastic by 11 Hen. 4, c. 4. It orders persons of the class of servants or labourers to "have bows and arrows, and use the same the Sundays and holidays, and leave all playing at tennis or football and other games called coits, dice, casting of the stone, kails, and other such importune games." This legislation is carried further by 17 Edw. 4, c. 3, which is entitled "Against unlawful games," and inflicts a fine of 20*l.* and imprisonment for three years upon any occupier who allows persons to play at the forbidden games on his premises, one half of such fine to go to the person suing for it and the other half to the King, or such person who has by grant or authority of Parliament the right to receive forfeitures in the locality where the offence occurs. But the most important statute of early times directed against games is 33 Hen. 8, c. 9, which remained in force until our days. It is entitled "The bill for the maintaining artillery, and the debarring of unlawful games," and its object is to enforce the practice of archery. By the preamble it sets forth that this has suffered greatly from tennis-play, bowls, cloysh, and other unlawful games, and it accordingly enacts heavy penalties against people of any degree or condition who keep premises for playing any game rendered unlawful by any statute or any new unlawful game to be invented in the future or who frequent such houses, and persons of the working class are forbidden to play such games. Dice and cards figure amongst the unlawful games prohibited by this statute, but they appear in company with games of pure skill, and it is evident that there was no feeling that the games to which the statute applied were wrong or immoral in themselves, for it will be observed that permits could be obtained for keeping premises for the purpose of the particular games named in the permit (a provision which was repealed by 2 & 3 Ph. & M. c. 9), and the prohibition was suspended at Christmas for servants playing

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

in their masters' houses. Moreover, any master could license his servants to play at cards or dice in his house, and if the master possessed an income of 100*l.* a year he could permit his servants to play at such games in their own houses either amongst themselves or with visitors. No reference whatever is made to wagering or gaming for money, so that it is evident that down to this date the whole object of the legislation was, as I have said, to prevent popular indulgence in games which would interfere with the practice of archery, and it was a matter of no importance in the eyes of the Legislature whether the games were games of skill or chance, and whether or not they were played for money.

The earliest statute which dealt with gaming properly so called is 16 Car. 2, c. 7, entitled "An Act against deceitful, disorderly, and excessive gaming." It has been frequently pointed out by the Courts that this Act is strictly for the purpose set out in its title. It is not directed against gaming in general, but only against such gaming as is unfair and excessive, and games of skill and chance are still mixed up together. It consists of two operative sections, the earlier directed against cheating at games, and the latter dealing with the case of persons playing at games "other than with and for ready money" and losing more than 100*l.* upon credit. With regard to such cases it enacts that the loser shall not be compelled to pay the sum so lost, and that the winner shall forfeit to anyone suing him within the year three times the excess of the winnings over the said sum of 100*l.*, one half to go to the King and the other half to the prosecutor, who shall in addition receive treble costs. This state of things continued until the Act 9 Anne, c. 14. It is clear that public opinion at this time was running strongly against gaming in all forms. A few years earlier the Act for the suppression of lotteries, 10 & 11 Will. 3, c. 17, had been passed, and it was strengthened by 9 Anne, c. 6. This feeling is still more strongly evidenced by 9 Anne, c. 14, which undoubtedly made a very great change in the law of England as regards gaming and gaming contracts. At the date of the passing of the Act it was, as we have seen, perfectly legal to play for ready money to any amount, and the winner could keep

the winnings. The loser might also go to the limit of 100*l.* on credit and still be liable to have his debts enforced against him by action at law. But if the losses on credit exceeded this sum, no portion could be recovered by process of law, and the winner was liable to serious penalties. The statute of Anne radically altered this. Although it still purported to be intended only to prevent "excessive and deceitful gaming," it enacted that if a person should lose 10*l.* or upwards at any time or sitting, and should pay his losings, he could recover them from the winner by action brought within three months, and if he did not do so any other person could thereafter obtain them by action against the winner, and the amount recovered was to go, one moiety to the person suing and the other moiety to the use of the poor of the parish where the offence was committed. The Act contains other stringent enactments against cheating and professional gamblers upon which I need not dwell, and concludes with the quaint exemption of the palaces of the Queen from its application, provided that she is actually resident therein, and the play is for ready money only. The most important section, however, for our purpose is s. 1. This declares that "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances" for gaming consideration or for the reimbursement of "any money knowingly lent or advanced for such gaming or betting as aforesaid" shall be utterly void. The meaning of this last-mentioned section has given rise to considerable difference of judicial opinion, though in my opinion the differences appear at first sight to be much greater than they in fact are. I will not, however, stay to discuss the section at the moment, but will pass on to the later statutes which deal with the matter.

We come next to 12 Geo. 2, c. 28, which is entitled "An Act for the more effectual preventing of excessive and deceitful gaming." This Act, which is expressed to be for the purpose of settling doubts whether certain games (including the game of hazard) are within the class of games or lotteries referred to in the Acts of William III. and Anne respectively, specifically enacts that they shall be so included, and prescribes penalties against those who are guilty of playing them. This Act is declared to

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

be "a good and wholesome law" by the statute of 13 Geo. 2, c. 19, which, by s. 9, adds to the proscribed list the game of "passage" and all other games which are played with dice except backgammon. Another Act passed in this same reign, namely, 18 Geo. 2, c. 34, adds "roulet" to the list of forbidden games, and otherwise strengthens the law against gaming in various ways, and includes a provision that anyone who wins or loses at play or betting at any one time the sum or value of 10*l.* shall be liable to indictment. But the Act which made the most substantial change in the law as enacted by 9 Anne, c. 14, is 5 & 6 Will. 4, c. 41, ordinarily known as the Gaming Act, 1835. The statute 9 Anne, c. 14, had made securities given for gaming debts absolutely void. It followed that an innocent holder for value of a note given for a gaming consideration could not recover upon it, and the Courts, as in duty bound, enforced this provision. This was found to work grave injustice, and accordingly the Gaming Act, 1835, provided that notes, bills, and mortgages, which by the statute of Anne would be rendered utterly void by reason of having been given for a gaming consideration, should in future be treated only as having been given for an illegal consideration. This would, of course, invalidate them in the hands of a payee or a person taking them with notice of the illegality of the consideration, but would not affect the rights of an innocent holder for value. This statute is still unrepealed, and is the one relied upon by the defendant in the present case. Inasmuch as no reliance is placed on more recent legislation, I need not refer to it. There is no pretence for suggesting that it has affected the interpretation of the older statutes, which, therefore, remains the same as at the dates when they were respectively passed.

Pausing here for a moment, let us consider the cumulative effect of these statutes. In the first place, they have rendered it illegal to play at certain specific games. In the next place, they have radically altered the position of winning at play. At common law such winnings, as we have seen, were legally recoverable independently of their amount. The very statutes that restricted their recoverability abundantly demonstrated this, if there could otherwise have been any doubt on the point. To

use the words of Lord Kenyon in *Good* v. *Elliott* (1), "all the statutes respecting gaming are so far parliamentary declarations that wagers and gaming had been lawful." But a sense of the injury that the nation might suffer from an abuse of gaming had induced the Legislature to make it illegal to win more than certain specific amounts at any one time or sitting, and to strike with disabilities securities given for money lost at play, or for the reimbursement of money knowingly lent for the purpose of play. But this state of things had only been arrived at by slow stages extending over nearly three centuries, and at no time did the common law or the Legislature treat gaming debts as in their nature illegal or unenforceable, or, in other words, as arising out of a turpis causa on which no action could be based. Thus, for instance, the Act of Charles II. did not interfere with play for ready money to any amount, and contented itself with rendering illegal winnings on credit exceeding 100*l.*; and it invalidated securities given for losings at play only if such losings exceeded that amount. Accordingly, while this statute was in force, actions used to be brought successfully to enforce gaming debts below 100*l.*: see, for example, *Danvers* v. *Thistlethwaite* (2), where a bond for 100*l.* lost at play was held good, although a watch worth 20*l.* had been lost at the same sitting, and had been handed over to the winner; see also *Walker* v. *Walker* (3) and *Stanhope* v. *Smith*. (4) Similarly, when the Act of Anne had reduced the permissible maximum to 10*l.*, we find actions successfully brought to recover winnings less than that amount: see Lord Kenyon's decision in *Bulling* v. *Frost*. (5) Lord Lyndhurst, sitting on appeal in *Quarrier* v. *Colston* (6), formally lays down that such winnings are recoverable at law. The case of *Clayton* v. *Jennings* (7) curiously illustrates this. In that case a plaintiff unsuccessfully sued for five guineas won by him in a bet of five guineas to ten guineas. But the ground of the decision was not that, being a bet, it could not be sued for, but that there was no mutuality in the contract, seeing that if he had

(1) 3 T. R. 693, at p. 705.
(2) (1668) 1 Lev. 244.
(3) (1698) 12 Mod. 258.
(4) (1696) 5 Mod. 351.
(5) (1794) 1 Esp. 235.
(6) 1 Ph. 147.
(7) (1770) 2 W. Bl. 706.

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

lost he could not have been made to pay the ten guineas by reason of its exceeding the limit of 10*l.* fixed by the statute of Anne.

Seeing, then, that the disabilities under which games and gaming debts lie derive their origin purely from statute, and are not in any way inherent in their nature, it becomes all-important to ascertain the area within which those statutes are operative. It will be seen that these gaming laws form a catena of statutes of a penal character, partly directed against the games themselves, partly against excessive gaming, and partly against the enforcement of debts contracted by gaming, whether securities are given for them or not. Their character may, I think, be best described by saying that they are in their nature disciplinary, intended to prevent the inhabitants of the realm from indulging in hurtful games or excessive play, which are treated by these statutes as being of the nature of disorderly acts and punished accordingly. Now prima facie the legislation of a country is territorial. Its Acts are intended to apply to matters occurring within the realm and not beyond it, and this principle applies more especially to Acts that are penal in their character. It is true that the language of an enactment or the nature of the subject-matter may indicate an intention to the contrary, but otherwise the prima facie presumption holds and the statute applies only to acts within the realm. If we examine this catena of statutes we find, in my opinion, not only an absence of any indications that their operation is not restricted to the realm, but abundant indications to the contrary. Take, for instance, the statute of Charles II. By s. 3 any person has a right to sue a man who has won more than 100*l.* on credit at a sitting, and recover from him three times the amount of the excess. Can it be maintained that this would apply to a Frenchman visiting England who had thus won more than 100*l.* when playing in his own country at a game which might be legal there? Probably the statute which most clearly indicates by internal evidence the local character of its application is the statute of Anne, which is the statute directly in question in the present case. Sect. 2 of that Act, which is the most drastic of all the sections, deals with the case of a person who has lost more than 10*l.* at a sitting and

has paid his losings. If he does not sue for and recover back the sum so paid by him within three months it is open to any person whatever to sue the winner and to recover three times the amount received by him, which he has then to share equally between himself and the poor of the parish in which the offence was committed. By another section a person cheating at cards is to be indicted and fined five times his winnings and suffer corporal punishment as in the case of wilful perjury. Magistrates may require persons living by gaming to find sureties for good behaviour, and betting to an amount over 20*s.* shall be considered a breach of the obligation, and lead to a forfeiture of the recognizances. Assaults arising out of gambling quarrels are to entail forfeiture of all the defendant's goods to the Crown and two years' imprisonment. All those provisions bear the stamp of being intended to apply to gaming within the realm only, and I cannot bring myself to interpret the gaming referred to in s. 1 of the Act as being different from that referred to throughout the rest of the Act, especially as I find in s. 1 itself a highly penal provision which makes incumbrances on lands created to defray gaming debts enure at once to the benefit of the heir as though the incumbrancer was naturally dead.

If, therefore, the question were res integra, I should have no hesitation in coming to the conclusion that the statutes against gaming to which I have referred were directed solely against acts done within the realm. But there are two reported cases, and two only, which directly deal with the question. The decisions of the two cases are diametrically opposed to one another. The earlier case is *Robinson* v. *Bland* (1), in 1760. This was an action on a bill for 672*l.*, the consideration being 372*l.* won from Sir John Bland at play in Paris, and 300*l.* lent to him by the plaintiff at the time and place of play. The Court held that the security could not be sued upon, the ground of the decision being that money won at play could not be recovered by English law, and that, therefore, the security was void under s. 1 of the statute of Anne. But they also held that the plaintiff was entitled to recover upon the consideration for the note so far as it was in respect of money lent, but not so far as it related to money won.

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

There are two reports of this case which do not agree with one another. In the report in 1 W. Bl. at p. 259 Lord Mansfield is made to say: "No action can be maintained for money won at gaming. The statute law prohibits any recovery upon a gaming consideration, as the common law does upon all other turpes causæ." It is impossible, in my opinion, that he could have said this, for he was a party to the judgment in *Clayton* v. *Jennings* (1), and to the Court reserving judgment in *Brown* v. *Berkeley* (2), both of which shew that he was aware that gaming considerations might in certain cases form valid causes of action. But though there is considerable doubt as to the correctness of the report, it is undeniable that the Court were of opinion, on the one hand, that the statute of Anne applied to gaming abroad, and, on the other, that money lent for play abroad constituted a good and enforceable debt both according to English and French law. The second case is that of *King* v. *Kemp*. (3) This was a case precisely on all fours with the case before the Court, and was tried before Willes J. The report that we have is a meagre one, but it is clear and explicit, and it leaves no room for doubt that that learned judge, after consulting his colleagues, held that in an action upon a cheque the plea that the consideration was money lent abroad for the purpose of play was not a valid defence, which amounts to saying that s. 1 of the statute of Anne does not apply to gaming beyond the realm.

The matter being thus left open upon the authorities, I prefer to decide the case upon that which, in my opinion, is the clear intention of the statute. I cannot bring myself to believe that s. 1 of the statute of Anne is intended to apply to games played in other localities or under other circumstances than those referred to in the other sections of the Act. The alternative interpretation, which would treat the section as intended to make void securities in respect of all contracts of a gaming character, is, in my opinion, unsustainable. If this had been its aim it would undoubtedly have been extended to wagering contracts, whether relating to games or not. This is confessedly not the case. Its scope is limited to bets or stakes connected with games,

(1) 2 W. Bl. 706. (2) (1775) 1 Cowp. 281.
(3) 8 L. T. 255.

and not even with all games, for it has been judicially laid down that the only games to which it refers are those to which the statute of Charles II. relates. This section, therefore, is closely linked with the rest of the legislation which restricts or inhibits games, and in my opinion is, like it, of a local character. To give it a broader application would be to make it out of harmony with the chain of statutes of which it forms part. I am the more inclined to take this view by reason of the decisions which establish that the consideration for the cheque in the present case was a debt valid, not only by French but also by our own law. This is expressly decided by Lord Mansfield in *Robinson* v. *Bland* (1) and approved of on appeal in *Quarrier* v. *Colston*. (2) In the former case Lord Mansfield clearly lays down that s. 1 of the statute of Anne avoids the security only, and not the debt. He points out that the word "contracts," which appears in the analogous section of the Act of Charles II., is here absent, and this view is consistently held by all the earlier authorities. Indeed, to hold the contrary would be to make s. 1 of the statute of Anne inconsistent with s. 2, unless we are to hold that taking a void security for a valid debt renders the debt itself invalid, a doctrine the contrary of which has been repeatedly and, as far as I know, consistently laid down by our Courts. The case of *M'Kinnell* v. *Robinson* (3) is often referred to as having changed the law on this point, but a reference to that case will shew that this view is without foundation. The ground of the decision in that case was that the money was lent for the purpose of playing at the game of hazard, a game which had been made illegal by express enactment. The debt was therefore held to be void as being money lent for an illegal purpose in accordance with the principle laid down in *Cannan* v. *Bryce* (4), where the status of a debt so contracted is fully discussed. The only case I have found which conflicts with this long line of authorities is *Applegarth* v. *Colley* (5), where the point was not necessary for the decision of the case, but in which Rolfe B. indicated the view that the statute of William IV. avoided the contract as well as the

(1) 1 W. Bl. 234, 256; 2 Burr. 1077.
(2) 1 Ph. 147.
(3) 3 M. & W. 434.
(4) (1819) 3 B. & Ald. 179.
(5) 10 M. & W. 723.

C. A. 1907

MOULIS v. OWEN.

Fletcher Moulton L.J.

security, whether the statute of Anne did so or not. He bases this conclusion upon reasoning which cannot, I think, be defended, and, as I have said, it is in conflict with the earlier authorities. The plaintiff therefore would be entitled to recover from the defendant the debt which formed the consideration for this cheque. I am aware that the consideration is not in this case specifically sued upon, but in these days, when the Courts seek to do full justice notwithstanding imperfections in the pleadings, I think it would have been right to add such a claim at the trial, and I have no doubt that the learned judge would have done so had the point been raised. I am of opinion that justice would be done by treating the amendment as having been made. The case would thus be freed from many difficulties, but for the reasons I have given I am of opinion that the plaintiff is entitled to succeed in this action, whether the amendment be made or not.

Application allowed. Judgment for the defendant.

Solicitors for plaintiff: *Clements, Williams & Co.*
Solicitors for defendant: *A. Newton & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1907
Feb. 5, 6.

JAMES NELSON & SONS, LIMITED *v.* NELSON LINE (LIVERPOOL), LIMITED (No. 2).

Ship—Contract of Carriage—Liability of Shipowner—Exceptions—Unseaworthiness—"Damage capable of being covered, or which has been paid for, by Insurance.

The plaintiffs shipped frozen meat on board the defendants' steamer for carriage from the River Plate to the United Kingdom upon the terms of an agreement which contained numerous exceptions exempting the defendants from liability for (inter alia) unseaworthiness or unfitness of the ship, "provided all reasonable means have been taken to provide against unseaworthiness"; "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." Owing to a defect in the refrigerating apparatus, the ship was not fit to carry the cargo, which was consequently seriously damaged. Through the neglect of the defendants reasonable means had not been taken to prevent the unfitness. The plaintiffs were partially covered by insurance, and had been paid the insured proportion of the loss:—

Held (affirming the judgment of Bray J.) that, the defendants having failed to take reasonable means to provide against the unfitness of the ship, the fact that the damage had been in part paid for by insurance did not exempt the defendants from liability for damages arising from the neglect of their implied obligation to supply a seaworthy ship.

Price v. *Union Lighterage Co.*, [1903] 1 K. B. 750; [1904] 1 K. B. 412, followed.

Application by the defendants for judgment or a new trial in an action tried before Bray J. with a jury, reported [1906] 2 K. B. 804.

The plaintiffs claimed damages for the breach of an agreement dated June 18, 1904, between themselves as charterers, and the defendants as owners, for the carriage of the plaintiffs' frozen meat in the insulated chambers of steamers belonging to the defendants from the River Plate to the United Kingdom. The material clauses of the agreement were as follows:—

"6. On arrival of each steamer at her loading berth in the River Plate notice shall be given to the charterers or their agents in writing of her readiness to load. Such notice shall not be given until the temperature of the insulated chambers

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

for frozen meat and offal shall have been reduced to at least 22 degrees Fahrenheit and the temperature shall be maintained thereat or lower up to the time of shipment commencing. During the time that frozen meat and offal are being received on board, the owners are to take care to preserve as low as possible a temperature in the chambers and in no case during stowing shall it unless prevented by breakdown of machinery or other exceptions mentioned in article 10 hereof be permitted at over 25 degrees Fahrenheit. The charterers shall not be bound to load any frozen meat or offal while the temperature is above 25 degrees Fahrenheit and any time so lost shall not count as lay days. After completion of the shipment the frozen meat chambers shall unless prevented as above mentioned be kept at a temperature not exceeding 25 degrees Fahrenheit until all the meat is discharged at port or ports of destination. The aforesaid notice of readiness shall be left at the office or place of business of the charterers in the River Plate between the hours of 10 A.M. and 4 P.M. Twelve hours after the receipt of such notice the lay days of the steamer shall commence provided the aforesaid temperature of 22 degrees Fahrenheit shall have been maintained in the insulated chambers set apart for frozen meat and offal since the beginning of such notice or as soon thereafter as the temperature may have been maintained at that temperature for a period of twelve hours. . . . .

"10. The owners are not to be liable for any loss damage prejudice or delay wherever or whenever occurring caused by the act of God the King's enemies pirates robbers thieves whether on board or not by land or sea and whether in the employ of the owners or not barratry of master or marines adverse claims restraint of princes rulers and people strikes or lock-outs or labour disturbances or hindrances whether afloat or ashore or from any of the following perils viz. insufficiency of wrappers rust vermin breakage evaporation decay sweating explosion heat fire before or after loading in the ship or after discharge and at any time or place whatever bursting of boilers nor for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise and whether arising from breakage of shafts or any latent defect

in hull boilers machinery equipment or appurtenances refrigerating or electric engines or machinery or in the chambers or any part thereof or their insulation or any of their appurtenances or from the consequences of any damage or injury thereto however such damage or injury be caused provided all reasonable means have been taken to provide against unseaworthiness collision stranding jettison or other perils of the sea rivers or navigation of whatever nature or kind and howsoever such collision stranding or other perils may be caused and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance nor for any claim of which written notice has not been given to the owners within forty-eight hours after date of final discharge of steamer. The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of the stevedores master mariners pilots engineers refrigerating engineers tug boats or their crews or other persons of whatsoever description or employment and whether employed ashore on board or otherwise for whose acts or defaults the owners would in anywise in connection with the execution of this charter otherwise be responsible. . . . .

"12. The owners shall unless prevented by exceptions enumerated in article 10 hereof subject the meat to the same treatment whilst in their charge that they have hitherto done but they shall not be responsible for its condition or for damage if any however caused. . . . .

"18. When the steamer is ready to take in meat each voyage in the River Plate [*sic*] the charterers have liberty to inspect and satisfy themselves that the refrigerating machinery and insulation are in good working order and condition. The owners further undertake on any voyage when required by the charterers to have the refrigerating machinery and insulation of any steamer surveyed before the meat is taken on board by Lloyd's agent if available or if not available by some other surveyor to be nominated by him or failing appointment by him to be agreed upon by the parties and to supply the charterers if required with the agent's or surveyor's certificate that the said machinery and insulation

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED No. 2).

are in proper working order and condition. The owners will in addition provide and pay engineers competent to work and keep the machinery in proper working order but the owners are not to be responsible for any defect deficiency or breakdown in the insulation or machinery or anything connected therewith or appertaining thereto however caused and whether existing before or after the shipment of the meat or the commencement or any resuming of the voyage or for any act default or neglect of engineers firemen stevedores labourers or other persons for whom they would otherwise be responsible. The protection given by this article to the owners is intended to be in addition to that given by article 10 but is subject to the proviso as to taking means to prevent unseaworthiness therein contained. . . . .

"22. The Nelson Line or River Plate Conference bills of lading are hereto attached, and their clauses are to form part of this agreement, except where such clauses are inconsistent with the clauses of this contract. The master to sign bills of lading as presented, referring for conditions of carriage, freight, &c., to this charterparty, and such bills of lading are given without prejudice hereto."

The Conference bills of lading contained the following clause: "Claims, if any, for loss by damage or short delivery, or otherwise, arising out of this bill of lading to be settled direct with the owners in Liverpool according to English law, to the exclusion of proceedings in the Courts of any other country. Owners not accountable in any case beyond net invoice price of the goods damaged or short-delivered."

In March and April, 1905, the plaintiffs shipped on board the defendants' steamship, the *Highland Chief*, a cargo of frozen meat for carriage to London on the terms of the agreement. The plaintiffs alleged that the meat was not carried safely, but arrived as to a great portion in a soft and mouldy condition and drenched with brine; that the temperature of the insulated chambers in which the meat was carried was not maintained during stowage at as low a temperature as possible, and was permitted during stowage and after shipment at over 25 deg. Fahrenheit, though not prevented by any of the exceptions mentioned in the agreement, whereby the meat was damaged; and, further, that the

ship was unseaworthy, and that the defendants did not take all reasonable means to provide against unseaworthiness.

The defendants admitted that the cargo had been damaged by the temperature not being kept sufficiently low, which they contended was due to the negligence of the engineers. The defendants alleged that they had taken all reasonable means to provide against unseaworthiness. They relied on the exceptions in the agreement as exempting them from liability for the damage.

The plaintiffs had insured the cargo to the extent of 75 per cent. of its value, and after this action had been commenced the underwriters had paid them a sum representing 75 per cent. of the loss.

The following were the questions left to the jury, with their answers: (1.) "What damage was done to the plaintiffs' goods on board the *Highland Chief* by not keeping the temperature of the holds down to 25 deg. during the loading thereof or the voyage or the discharge? State the total amount in pounds, shillings and pence. And if you think that the damage was increased by the plaintiffs having improperly dealt with it, state how much should be deducted on that account." Answer: "23,900*l*. No." (2.) "Was the *Highland Chief* at the commencement of the voyage unfit to carry the cargo of frozen meat to its destination?" Answer: "Yes." (3.) "If 'yes,' were all reasonable means taken to prevent such unfitness?" Answer: "No." (4.) "If reasonable means were not taken, was the neglect the neglect of the captain, engineers, ship's officers or crew only, or was it partly the neglect of the defendants, or their officers or agents?" Answer: "The neglect was that of the defendants, their officers and agents." (5.) "Was the whole or any part of the damage caused by such unfitness?" Answer: "The whole.". (6.) "If you think that part of the damage was caused before the commencement of the voyage by unfitness to receive and safely keep the cargo of frozen meat during the period of loading, state what part of the damage was so caused, and answer the following questions:—were reasonable means taken to prevent such unfitness? if not, was the neglect the neglect of the captain, engineers, ship's officers and crew only, or was it partly the neglect of the

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

defendants, their officers and agents?" Answer: "We think no damage was done during the period of loading or before the commencement of the voyage."

On further consideration, Bray J. held that the fact that the damage had been partly paid for by insurance did not exempt the defendants from liability for damage caused by unseaworthiness or unfitness at the commencement of the voyage when reasonable means had not been taken by them to prevent the unfitness. The defendants appealed.

Pickford, K.C., and *J. A. Hamilton, K.C.* (*Bailhache* with them), for the defendants. The defendants are entitled to judgment, notwithstanding the findings of the jury. If their ordinary plain meaning is placed upon the words of clause 10, that clause operates to relieve the shipowners of all liability by reason of the provision "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance." No doubt there is an implied obligation on the part of shipowners to supply a seaworthy ship, and, accepting the answers of the jury, the defendants would be liable to damages for their failure to do so, were it not that their contract with the plaintiffs exempts them from such a liability. It is clear that under the agreement the defendants are relieved from liability for damage caused by perils that are expressly excepted, but the true meaning of the agreement is that, even if the damage results from causes other than those expressly specified, the shipowners are not to be liable provided that the damage was capable of being insured against, or (as was the case here) has been wholly or in part paid for by insurance. The provision as to insurance is meaningless, if it is to be read as being subject to the limitations that would apply with regard to the excepted perils—that is, that it is to apply only where the defendants have fulfilled their implied obligation of providing a seaworthy ship and have not been guilty of negligence. The decided cases are distinguishable and in all of them the clause under interpretation was capable of more than one meaning. In *Sutton* v. *Ciceri* (1), where it was

(1) (1890) 15 App. Cas. 144.

held that the exception of insurance risks did not discharge the defendants from their liability as ordinary carriers, the rates were for freight only, and the key to that judgment is that the words "do not cover insurance risks" must be put in contra-distinction to the clause "these rates are for freight only," and must therefore be read in a limited sense. Similarly, in *Price* v. *Union Lighterage Co.* (1), the words "covered by insurance" were used in contradistinction to the words "for conveyance only." In both those cases an intelligible meaning could be given to the words used by excluding the liability of the carrier as an insurer and leaving untouched his liability for negligence, but in the present case the words are quite useless if a limited interpretation is placed upon them. There is nothing to prevent a shipowner from saying that he will not be liable for damage arising from unseaworthiness, and the intention to exclude such a liability is here clearly expressed. There is an unequivocal agreement that the defendants shall not be liable for loss which can be covered, or has been paid for, by insurance, and its application cannot depend upon the question whether the ship which the defendants supplied was seaworthy. The American cases *Phœnix Insurance Co.* v. *Erie and Western Transportation Co.* (2) and *Inman* v. *South Carolina Ry. Co.* (3), though not precisely in point, afford some support to the defendants' contention. Further, the defendants are a limited company, and unless the failure to use reasonable means to provide against unseaworthiness is directly attributable to the defendants, the plaintiffs cannot recover, because by a subsequent paragraph at the end of clause 10 there is an express exception of the acts of servants and agents, for which the defendants are not to be liable. [They also cited *Tattersall* v. *National Steamship Co.* (4); *Morris* v. *Oceanic Steam Navigation Co.* (5)]

Rufus Isaacs, K.C., *Scrutton, K.C.*, and *Atkin, K.C.*, for the plaintiffs, were not called upon.

COLLINS M.R. This is an appeal from a judgment of Bray J. in an action which involved the construction of an agreement for

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(2) (1886) 117 U. S. 312.
(3) (1889) 129 U. S. 128.
(4) (1884) 12 Q. B. D. 297.
(5) (1900) 16 Times L. R. 533.

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

Collins M.R.

carriage of goods by sea, the jury, in answer to questions put to them by the learned judge, giving a verdict which he construed to be a verdict for the plaintiffs. On that verdict and judgment two points have been raised on this appeal. The first is as to the construction of the particular exception in an agreement made between the plaintiffs as charterers and the defendants as shipowners, and the claim is in respect of a breach of an agreement between the charterers and shipowners for the carriage of the plaintiffs' frozen meat in the insulated chambers of steamers belonging to the defendants from the River Plate to the United Kingdom. The question arises upon clause 10, a long and very elaborate clause drawn with the obvious intention of exempting the shipowners from liability in respect of all possible shortcomings on their part. [His Lordship read the clause.] At the trial Bray J. put certain questions to the jury, which, with their answers, I will read. [His Lordship read the questions and answers.]

The first point taken for the defendants turns upon the words in clause 10, "and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance," the defendants contending that the damage here in question was capable of being covered by insurance, and had also been partly paid for by insurance, and that they therefore came within the exception and were discharged from liability. That is the chief question in the present case, and with respect to that the defendants are concluded by the decision in *Price* v. *Union Lighterage Co.* (1), which is obviously in point and which covers this case. In that case the judgment of Walton J. was affirmed in the Court of Appeal, but the judgment of the latter Court added nothing to it, and I refer to the judgment of Walton J. as the leading authority on the point, containing as it does a complete and accurate exposition of the law, and summing up the authorities and applying them to the facts of that case. The head-note of that case runs thus: "Goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability 'for any loss of or damage to goods

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.

which can be covered by insurance.' The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. In an action to recover damages for the loss of the goods:—Held, that, the exemption being in general terms not expressly relating to negligence, the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants." The language of the clause in that case and in the present is to a certain extent the same; in *Price* v. *Union Lighterage Co.* (1) the clause runs, "for any loss of or damage to goods which can be covered by insurance": in the present case the language is practically identical, but there are the added words "or which has been wholly or in part paid for by insurance." In both limbs of the sentence comes the word "insurance," used, apparently, in the same sense. Walton J., applying the principle of previous decisions, held that, unless it was distinctly so provided by statute, the shipowner could not claim to be protected from the consequences of his own negligence; and, looking at the provision introduced by the carrier into the contract limiting or excluding his liability for loss or damage to goods which could be covered by insurance, he read the clause as referring to insurance covering the liability peculiar to his position as a common carrier, that is to say, the extraordinary obligation of a common carrier, and not as referring to the ordinary obligation of a carrier to take reasonable care of the goods carried by him. In that case Walton J. held, in conformity with the authorities, that, while the defendant had left open the ordinary obligation of taking reasonable care, he had covered the liability arising on the special obligation of a common carrier as an insurer of the goods entrusted to him. That was the construction which the learned judge placed upon the word "insurance" as there used, and, placing that construction upon it, he held that the shipowner was not relieved from the consequences of the want of ordinary care. Applying that decision to the present case, it seems exactly to cover it, and the contract here must therefore be read as one which does not exempt the shipowner from liability for the neglect of ordinary care. This would be indisputable if the present contract contained only the

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

Collins M.R.

same limitation as that in the former case: is any alteration in the rights of the parties effected by the introduction of the words "or which has been wholly or in part paid for by insurance"? In my opinion the insurance mentioned in the latter branch of this exception must be the same class of insurance as that in the earlier part, and must be limited to the same extent; the same reasoning applies to both branches, and therefore neither the effecting of an insurance nor payment under it affects the original and continuous liability of the shipowner to damages for a failure to exhibit ordinary care in the carriage of goods on board his ship. I think, therefore, that the main contention of the defendants is unsound, and that on this ground the judgment of Bray J. cannot be impeached.

Another point was taken by the defendants which might invalidate the decision. This point turns on the latter part of the same clause, and is addressed to the qualification put upon the exemption from liability for unseaworthiness, which is in these words, "provided all reasonable means have been taken to provide against unseaworthiness." It was in view of that portion of the clause that Bray J. put questions 3 and 4 to the jury, which, with their respective answers, I have already read. The defendants contend that, unless the failure to use reasonable means to provide against unseaworthiness is to be attributed directly to the defendants, who are a limited company, the plaintiffs must fail; and that, taking the subsequent clause at the end of the list of exceptions, the defendants have expressly saved themselves from responsibility for the acts of their agent. The words are undoubtedly large, and run, "the above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of the stevedores master mariners pilots engineers refrigerating engineers tug boats or their crews or other persons of whatsoever description or employment." It is contended that the only persons who can be said to have failed to provide reasonable means against unseaworthiness were people who might be described as agents of the defendants and for whose acts they might have been liable but for the clause which I have just read, and that, as the effect of the clause is to prevent their being

treated as liable for the acts of any other persons whatever, the plaintiffs have failed to deprive the defendants of the benefit of the exception, and are therefore not entitled to succeed. I do not think that the clause can have that effect. It is a clause of general exception of certain specified classes of persons, and comes at the end of a long list of exceptions, and may very well be treated as applying to those particular exceptions which have not been specially treated in the earlier part of the clause. Now, the exception or qualification of immunity from loss by unseaworthiness is itself subject to a very special provision in these terms, "provided all reasonable means have been taken to provide against unseaworthiness collision stranding jettison or other perils of the sea rivers or navigation of whatever nature or kind and howsoever such collision stranding or other perils may be caused," which is a special provision in the earlier part of the clause, and it is not possible to read into it, as qualifying it, a provision at the end of the clause which would have the effect of annulling all possible liability on the part of the shipowner, because it would make it impossible to shew that all reasonable means had not been taken in a case where, as in the present case, the defendants are a company who are compelled to act through agents, and if you cannot attribute the want of care to anything done by them through their agents, they stand outside the possibility of being put outside the protection of the clause. In my opinion the clause dealing with the qualification of the liability for unseaworthiness is complete in itself, and does not require to be interpreted by the subsequent limitation at the end of the clause, which, though perhaps applicable to other exceptions, is not applicable to, and ought not to be applied to, one which stands complete in itself and which addresses itself to the very same point. I think that the two clauses cannot be read together so as to arrive at a rational conclusion; the one part is contradictory of the other, and therefore, as a matter of common sense and as a recognized canon of construction, we ought if we can to apply all parts of the clause so that they shall not defeat each other. The only way in which we can make it all consistent is by treating the later words as only applying to those exceptions which have not been specifically dealt with in the same

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

sense by the earlier part of the clause. In my opinion, therefore, that point also fails, and the answer of the jury can only be impeached on some such ground as that it is against the weight of evidence; no such ground is suggested here, and the verdict and judgment can only be attacked if the interpretation placed on the clause by the defendants is right. For these reasons I think that this appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion and for the same reasons. We have been told that clause 10 is the longest form of exception clause known to exist; I hope that it is also the worst form known to the mercantile world, for it is a patchwork, ungrammatical, and barely intelligible form of clause. It surely ought not to be beyond the power of commercial men to express in terse and clear language that which they desire to effect in a transaction of this kind, and if shipowners desire to free themselves from liability for the consequences of the unseaworthiness of their ships, it rests upon them to make their intention perfectly clear; the intention is certainly not clear in this case. In my view the warranty of seaworthiness implied by law holds good and is in force except in one event which, having regard to the findings of the jury, has not happened here.

As to the second point, which arises on the latter portion of clause 10, beginning "the above-mentioned exceptions shall apply," I agree with the view which has been expressed by my Lord. It is, I think, a rule of construction that general words in a document do not defeat an earlier special provision as to the same subject-matter—both must, if possible, be read together, so as to make the whole document consistent; and when we consider that a limited liability company can only act by its agents, the only way in which effect can be given to both clauses is by holding that the last clause was only intended to operate, and can only operate, upon the earlier parts of the exception clause which do not contain any special provision such as the proviso for the taking of all reasonable means to provide against unseaworthiness.

FLETCHER MOULTON L.J. I am of the same opinion, and adopt the reasoning of my brethren; I myself arrived at the same

conclusion in a somewhat different way, which does not, however, conflict with the views which they have expressed.

It is common ground that in such a contract as the present there is an obligation on the shipowner to supply a seaworthy ship. I will assume in favour of the defendants that the exception relating to unseaworthiness or unfitness in clause 10 is to be taken as an exception applying to this general obligation to supply a seaworthy ship, although I feel some doubt whether there is in truth anything in this printed contract which qualifies the obligation to supply a ship initially seaworthy, because the exception contained in clause 10 seems to me to refer to times subsequent to the moment of the supply of the ship. When that exception is scrutinized, it is found to be conditional. If paraphrased shortly (in order to avoid the verbiage of the actual language used), the material part of the exception would run something like this, "or for initial unseaworthiness, provided all reasonable means have been taken to provide against unseaworthiness." The jury have found that in this case all reasonable means to that end had not been taken. The exception therefore disappears and the obligation of initial seaworthiness remains.

To meet this point an ingenious argument was raised on behalf of the defendants to the effect that this is not the meaning of clause 10 as a whole by reason of the paragraph commencing "The above-mentioned exceptions," which comes immediately after the list of exceptions. The defendants contend that this paragraph is to be applied to the non-fulfilment of the condition of which I have spoken as well as to the unseaworthiness. But the language, when examined, does not bear this out. It clearly relates to the origin of the unseaworthiness, and not to the terms on which it will be excused. The words "whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of," &c., make it clear that the exception is to hold good even though the unseaworthiness arises from the acts, neglects, or default of the named classes of people. But they do not do away with the condition. If I may paraphrase this part of the clause by substituting for it the words "however arising," it is apparent that its sole effect is to make

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL), LIMITED (No. 2).

Fletcher Moulton L.J.

the exception read thus, "or for initial unseaworthiness, however arising, provided all reasonable means have been taken to provide against unseaworthiness." It leaves the exception still subject to the condition, and unless the defendants can prove that this condition has in fact been satisfied the whole exception must be wiped out. Here the jury have found that the condition was not in fact satisfied, and the case is therefore reduced to one which is subject to the ordinary obligation to supply a seaworthy ship.

There is a second point, which for a time struck me as one of some difficulty. It was contended by Mr. Hamilton that the words "and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance" in clause 10 should be regarded as independent of the rest of the clause and as limiting absolutely the liability of the defendants whatever the nature of the breach which they have committed. Assuming for this purpose that this portion of clause 10 is to be treated as a separate clause, can the defendants claim the benefit of it? In my own opinion they cannot. The fundamental obligation of this contract is not merely to supply a ship, but to supply a seaworthy ship, and the clause, which is in fact a limitation of liability, cannot be prayed in aid by the defendants if they have failed to fulfil their fundamental obligation. If they do fulfil that obligation the clause limits their liability; otherwise they cannot rely upon its assistance. I may suggest what I think is not an unfair parallel. Suppose there were a contract to warehouse goods with a limitation of liability for damage by weather to a sum not exceeding 10 per cent. of the value of the goods, and the warehouseman put the goods in a warehouse with no roof; he would have failed to put them into a warehouse within the meaning of the contract, and could not plead that his liability was limited to 10 per cent., because he had not fulfilled his fundamental obligation of providing a warehouse for their storage. Similarly the defendants here cannot claim the benefit of the suggested limitation of their liability, it having been found as a fact that they failed in their fundamental obligation to supply a

seaworthy ship. They must meet the full damages arising from that failure.

Appeal dismissed.

C. A. 1907

JAMES NELSON & SONS, LIMITED v. NELSON LINE (LIVERPOOL) LIMITED (No. 2).

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*
Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. J. B.

WHITTALL & CO. *v.* RAHTKEN'S SHIPPING COMPANY, LIMITED.

1907

Feb. 28.

Ship—Charterparty—Demurrage—Lay Days—Sundays and Holidays excepted—Work done on Sundays and Holidays—Shifting from Port to Port.

A charterparty provided that thirteen running days, Sundays and holidays excepted, should be allowed the charterers for loading the cargo. Demurrage for any days over and above the said laying days was to be paid at the rate of 35*l.* per day.

By the direction of the charterers work was done in loading the ship on a Sunday after the lay days had begun to run and before they had expired:—

Held, that the proper inference to be drawn was that the parties had agreed to include that day among the lay days, and that, notwithstanding the express terms of the charterparty, that day was to be counted as a lay day.

In the absence of any indication to the contrary, the same inference is to be drawn when work is in fact done in loading the ship on a Sunday or holiday, whether by the direction or at the request of the charterers or not.

The charterparty also provided that the ship should proceed to a named port and there load a cargo. The charterers were to have the option of using one or two neighbouring ports in the district of the named port, time in shifting ports to count as lay days:—

Held, that a Sunday or holiday occupied at the request of the charterers in shifting from one port to another in the district of the named port was to be included in the lay days.

TRIAL of action before Bray J. without a jury.

The plaintiffs were the charterers, and the defendants were the owners of the steamship *Friederike*.

The action was brought by the plaintiffs to recover a sum of 74*l.* 7*s.* 6*d.*, paid under protest by them to the defendants for two days and three hours' demurrage of the ship.

1907

WHITTALL & CO. v. RAHTKEN'S SHIPPING COMPANY, LIMITED.

By a charterparty dated London, September 11, 1906, it was agreed between the defendants and the plaintiffs that the *Friederike* should proceed to Smyrna and there load a cargo of grain, fruit, or other lawful merchandise, and therewith proceed to London or Leith and deliver the same on being paid freight. The captain was to sign bills of lading at any rate of freight, and the owners were to have a lien on the cargo for all freight, dead freight and demurrage.

The charterparty contained the following clauses :—

"8. Charterers to have the option of using one or two additional neighbouring loading ports or places in Smyrna district paying all port charges, and time shifting ports to count as lay days.

"9. Thirteen running days, Sundays and holidays excepted, are to be allowed the said merchant (if the steamer is not sooner despatched) for loading the cargo as above, to commence when the steamer is moored and ready, having received pratique, and so reported by the master, and the time so employed, part days counting as part days, to be agreed by the master and charterers, or their agents."

"12. For any days on demurrage over and above the said laying days, steamer to be paid at the rate of 35*l.* per day."

The *Friederike* arrived off Smyrna on the morning of Tuesday, September 18, 1906. She was then ordered by the authorities into the quarantine station. The quarantine was completed at about 11.30 A.M. on Wednesday, September 19. While the vessel was in quarantine at Smyrna the master received from the plaintiffs' stevedore a letter from the plaintiffs, dated September 18, in these terms, omitting formal parts: "After finishing your quarantine please proceed to Chulukioi (1) in Iassus Bay, Mandelyah Gulf, where you will load about 350 tons barley in bulk for London $\frac{\text{and}}{\text{or}}$ Leith, 100 tons of beans, 50 tons of emery stone, both in bulk, and about 1000 bags of millet seed for London. The balance of your cargo will be shipped at

(1) Otherwise Kuluk: see Stieler's Hand Atlas, map No. 59. This place lies not many miles north-east of Budrum (Halicarnassus), and is marked on the map forming the frontispiece to C. T. Newton's Travels and Discoveries in the Levant (1865).

Smyrna, and consists of about 3000 tons of barley in bulk and balance fruit and general cargo for London and Leith. . . . ." Accordingly, on obtaining free pratique, the ship weighed anchor and proceeded to Chulukioi, where she arrived on the morning of Thursday, September 20. At 8.40 A.M. on that day she commenced loading.

On Saturday, September 22, while the loading was in process, the master received a letter from the plaintiffs' agent at Chulukioi, dated the same day, in these terms: "I beg to advise you that we shall require the winches at 6 to-morrow morning (Sunday) in order to finish the shipment from this port, and so that you may be able to leave here at about 2 o'clock in the afternoon."

In accordance with these instructions the loading proceeded on Sunday, 23rd. The shipment at that place was completed at 2 o'clock P.M. on that day. At 2.25 the ship weighed anchor for Smyrna. It was admitted that the time from 2 P.M. on that day until 9 A.M. on Monday, 24th, was occupied in shifting from Chulukioi to Smyrna. Loading recommenced on Monday, 24th, and was continued until 5 P.M. on Friday, October 5, excluding Sunday, September 30, but including Thursday, October 4, which, being the birthday of the Sultan of Turkey, was a holiday at Smyrna. The loading was completed at 5 P.M. on Friday, 5th, and at 6 P.M. the vessel weighed anchor.

In these circumstances the master took the view that the defendants were entitled to two days and three hours' demurrage. He contended that the lay days began to run at 2 P.M. on Wednesday, September 19, when his ship was in free pratique, after leaving the quarantine station; that by clause 8 of the charterparty the time taken in shifting from Smyrna to Chulukioi counted among the lay days; and that Sunday, September 23, was also to be included, because work was in fact done on that day in loading the ship and in shifting from Chulukioi to Smyrna, and consequently that the thirteen days allowed by clause 9 of the charterparty expired at 2 P.M. on Wednesday, October 3. Accordingly, when the plaintiffs tendered him a bill of lading for 500 quarters of barley which had been loaded deliverable in London to their order or assigns, paying

1907

WHITTALL & CO. v. RAHTKEN'S SHIPPING COMPANY, LIMITED.

freight as therein provided, he inserted in the margin of the bill of lading the words "Demurrage 74*l.* 7*s.* 6*d.* to be paid before breaking bulk."

The plaintiffs contended that the lay days began to run at the earliest at 9 A.M. on Thursday, September 20, when the ship reached her first port of loading, namely, Chulukioi; that September 23 being a Sunday and October 4 being a holiday were both excluded from the lay days by clause 9 of the charterparty; that the lay days therefore did not expire until 9 A.M. on Saturday, October 6, and that consequently no demurrage was due.

On arrival of the cargo in London the plaintiffs took delivery under the bill of lading and paid under protest the 74*l.* 7*s.* 6*d.* alleged by the defendants to be due for demurrage.

The plaintiffs now claimed to recover this sum.

Leck, for the plaintiffs. The defendants were not entitled to any demurrage. The time occupied in shifting from Smyrna to Chulukioi and from Chulukioi to Smyrna is not to be counted among the lay days. The defendants contend that it is to be included by clause 8 of the charterparty, which provides that "time shifting ports" is "to count as lay days": but in order to construe those words one must look to clause 9 to find out what lay days are; and from that clause it is clear that they do not commence until the steamer is moored and ready having received pratique, and so reported by the master; and, moreover, that Sundays and holidays are not to be included among them. Now, the shifting from Smyrna to Chulukioi on September 19 took place before the vessel was moored and ready to receive cargo and so reported by the master; those events did not happen until the ship arrived at Chulukioi on September 20, and therefore nothing can be counted among the lay days before that date.

Moreover, the time occupied in shifting from Chulukioi to Smyrna on September 23 must be excluded from the lay days, because that day was a Sunday. The same applies to Sunday, September 30, and to Thursday, October 4, which was a holiday. The lay days, therefore, did not expire until Saturday, October 6, and nothing was due for demurrage.

D. Stephens, for the defendants. Clauses 8 and 9 of the charterparty refer to different matters, and there is no reason for reading into clause 8 any of the exceptions or conditions in clause 9. Time occupied in shifting ports counts as lay days, whether the shifting takes place before the lay days mentioned in clause 9 have commenced to run or not, and whether it takes place on a Sunday or a weekday. Therefore the time occupied in shifting on September 19 and 23 is to be counted.

Further, as to Sunday, September 23, work was in fact done in loading the ship on that day. It has been held in two cases that when this happens the proper inference to be drawn, in the absence of any indication to the contrary, is that the parties have agreed to treat as a lay day the Sunday or other holiday on which work has been done, even though the charterparty expressly excludes Sundays and holidays from the lay days. The two cases are *Branckelow Steamship Co.* v. *Lamport & Holt* (1) and *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool) Ld.* (1) The decisions in both these cases

(1) LORD RUSSELL OF KILLOWEN C.J. February 17, 1897.

BRANCKELOW STEAMSHIP COMPANY, LIMITED *v.* LAMPORT & HOLT.

The plaintiffs were the owners, and the defendants the charterers of the steamship *Highfield*.

The action was brought to recover 216*l.* 16*s.* 8*d.* for five days' demurrage.

By the contract of charter, which was dated December 3, 1895, the *Highfield* was to load not exceeding 2300 tons of wheat $\frac{\text{and}}{\text{or}}$ maize at Rosario, or at a port below, completing at Buenos Ayres or La Plata with cargo and live stock. The contract contained the following provision: "The steamer is to be loaded at the rate of 175 tons per weather working day, Sundays and holidays excepted."

The ship went to Rosario, and there took in part of her cargo. She then proceeded to La Plata, where she completed her cargo, including cattle and live stock. On Thursday, March 19, 1896, she arrived at La Plata at 4 P.M., having then taken eight days. On Saturday, 21, she had taken ten days.

The material question was whether Sunday, March 22, and Wednesday, March 25, which was a holiday at La Plata, on each of which days the work of loading was actually carried on, were to be counted as working days.

Joseph Walton, *Q.C.*, and *Lewis Noad*, for the plaintiffs.

Pickford, *Q.C.*, and *Carver*, for the defendants.

LORD RUSSELL OF KILLOWEN C.J. With regard to Sunday, March 22, clearly according to the charterparty that day was not to be computed; that is to say, the ship, on the one hand, was not bound to receive cargo, and, on the other hand, the charterers

1907

WHITTALL & Co. v. RAHTKEN'S SHIPPING COMPANY, LIMITED.

follow logically from the decision of the Court of Appeal in *The Katy*. (1) Carver on Carriage by Sea, s. 613, 4th ed. (1905) p. 729, note (*l*), citing *Holman* v. *Peruvian Nitrate Co.* (2), were not bound to put cargo on board; but in the present case in fact the whole of that Sunday was, at the instance of the charterers, used by them for putting cargo on board, and the captain and crew were working when they were not bound to work on that day, and the cargo was put on board during the ordinary working hours of an ordinary working day. Is that day to be left out of account merely because the charter-party says that Sundays and holidays are to be excluded? I think not. I think it is to be counted against the charterers, because I think when you find a full day occupied by the loading of cargo by the charterers on the one hand, who are not bound to load, and the receipt of cargo by the ship on the other hand, which is not bound to receive, the fair inference is that both parties agreed to treat that as a working day.

Then with regard to Wednesday, March 25. It is admitted that that day was a holiday according to the custom of the place at which the ship then was, namely, La Plata. It is said that a number of people worked, and perhaps more worked than did not work. In point of fact the charterers or the charterers' men did not work. If they had, then the observations I have made as to the Sunday would apply to this day also. The result is that the plaintiffs will have judgment for one day's demurrage.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Sons.*

Solicitors for defendants: *Field, Roscoe & Co.*

(1) [1895] P. 56.

(2) (1878) 5 R. 657.

CHANNELL, J.

January 15, 1907.

JAMES NELSON & SONS, LIMITED *v.* NELSON LINE (LIVERPOOL), LIMITED.

The plaintiffs were charterers under an agreement between themselves and the defendants, who were the owners of several steamships, including the *Highland Heather*.

The action was brought to recover (inter alia) a sum of 180*l.* 10*s.*, paid under protest by the plaintiffs to the defendants, including a sum of 10*l.* 16*s.* 8*d.* for six and a half hours' demurrage of the *Highland Heather*.

The agreement, dated June 18, 1904, between the plaintiffs and the defendants recited that the defendants had services of cargo and live stock steamers which they were running or proposed to run as a two-weekly line from the River Plate to the port of Liverpool and as a monthly line from the River Plate to the port of London, and that the plaintiffs had agreed to ship their output for the United Kingdom of frozen meat and offal by the said lines, and that the plaintiffs had agreed to carry the same on the conditions thereinafter contained.

By clause 6 of the agreement, on arrival of each steamer at her loading berth in the River Plate notice in writing was to be given to the

is to the same effect. The result of these authorities is that Sunday, September 23, is to be taken as a lay day. The time

---

plaintiffs of her readiness to load. Twelve hours after the receipt of such notice the lay days of the steamer were to commence. With regard to the lay days the clause provided as follows: "Seven weather working days (Sundays and holidays excepted) to be allowed by the owners to the charterers for loading. . . . . For any time beyond the period above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* per day and so in proportion for any part of a day payable day by day."

The *Highland Heather*, one of the steamers tendered and accepted under this agreement, arrived at Las Palmas in the River Plate. Her lay days began to run on Tuesday, March 6, 1906. She commenced loading at 7 A.M. on March 7, and continued until Sunday, March 11. No work was done on that day. Loading recommenced on March 12, proceeded on that day and the next, and was completed at 8.30 A.M. on March 14. March 13 and 14 were public holidays at Las Palmas.

Under these circumstances the defendants contended that the lay days expired on March 13 and claimed six and a half hours' demurrage. The plaintiffs contended that March 13 and 14, being holidays, were not to be reckoned among the lay days. In their view the lay days did not expire till March 15, and they were not liable for any demurrage. The defendants threatening to exercise a lien for the demurrage they claimed, the plaintiffs paid the amount under protest and now claimed to recover it.

Rufus Isaacs, *K.C.*, *J. R. Atkin*, *K.C.*, and *Leslie Scott*, for the plaintiffs.

Pickford, *K.C.*, and *Maurice Hill*, for the defendants.

CHANNELL J. The next point is that about the holidays. Upon that point there is some difficulty, partly created by my own decision in *Houlder* v. *Weir* ([1905] 2 K. B. 267). In that case there was a special agreement that the Sunday worked upon was not to be counted as a lay day, so that it was really unnecessary to decide the question which is raised in the present case.

Now I take it to be the law that in a contract such as I have before me neither party is bound to work on a Sunday, and neither party is entitled to work on a Sunday except with the consent of the other. Therefore the real point is, if they do work, upon what terms do they work? If there is any agreement on the subject that clearly must bind; but when there is no such agreement, what inference is there to be drawn? No doubt the work when done is usually done by one party at the request of the other. The question is, Upon what terms did the one ask and the other consent that the work should be done? If in any particular case there is any indication, that of course helps towards the solution of that particular case.

But the case with which I have to deal is one in which there is nothing to guide me as to the terms on which the work was done. I do not even know which side proposed that it should be done. It seems to have been done as much for the advantage of one party as for that of the

1907

WHITTALL & Co. v. RAHTKEN'S SHIPPING COMPANY, LIMITED.

allowed for loading expired, therefore, on Wednesday, October 3, and the defendants were entitled to the amount they claimed.

Leck, in reply. When the charterparty expressly excludes Sundays and holidays from the lay days, and work is done by one party at the request or direction of the other, the inference is, at the highest, that the latter impliedly promises to indemnify the former for any loss incurred through complying with the request or direction. The Court cannot infer an agreement by conduct directly contrary to the written contract between the parties which would include, when the written contract has expressly excluded, Sundays and holidays from the lay days. If work is done on those days it can only be done by permission of the master. "If no conditions were attached to that

---

other. It was important for the ship to get on from one loading port to the next, and of course the saving of demurrage was a thing of considerable importance to the charterers. Then what is the proper inference to be drawn? I think the former cases, none of which are quite conclusive, but which have a bearing upon the point, namely, *The Katy* ([1895] P. 56) and *Branckelow Steamship Co.* v. *Lamport & Holt*, shew this:—that where the time is to be counted by something which in the contract is called working days, then, if the parties agreed to work on a particular day when neither of them was bound to work, the inference is that they agreed to treat that as a working day, *i.e.*, as one of the working days mentioned in the contract. The only difficulty in the present case is the express exception of Sundays and holidays from the seven working days. But here they are weather working days, and therefore there was good reason for excluding Sundays and holidays. This seems to me therefore to amount to a contract that the charterers are to have seven working days in which to load the ship. If then work is in fact done on a Sunday or holiday, I think I ought to follow what has been said by other judges in similar cases, namely that the agreement to work on those days must be construed, in the absence of any indication to the contrary, as an agreement to treat those days as working days. This brings one round to the construction that where Sundays and holidays are fairly and substantially used as working days, then, in the absence of any indication to the contrary, the proper inference to draw is that the parties meant them to be treated as working days. I come therefore to the conclusion that the holidays on which work was done must count among the seven working days.

Judgment for the defendants.

Solicitors for plaintiffs: *Charles Russell & Co., for Lightbound, Owen & MacIver, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickenson & Co., Liverpool.*

permission it would have to be treated as a mere permission to work overtime, and consequently the fact of working would not prevent the time from being excluded from the lay days": *Houlder* v. *Weir*, per Channell J. (1)

BRAY J. The questions which I have to decide are, first, whether there is to be reckoned as part of the lay days the time taken in shifting from Smyrna to Chulukioi, and, secondly, whether, as on Sunday, September 23, work was done in loading cargo at Chulukioi and shifting from that place to Smyrna, that Sunday is to be reckoned as a lay day. Incidentally, there is also the question whether Thursday, October 4, being a holiday on which work of loading was done, is also to be considered a lay day.

The answer to the first question depends upon the construction of this charterparty, and primarily upon the meaning of clauses 8 and 9 of that instrument. In my opinion these clauses relate to two separate matters. Clause 8 relates to time occupied in shifting from one port of loading to another, and I have no right to read into that clause exceptions or excuses specified in clause 9 as applicable to the lay days. I must read clause 8 as it stands, namely, that the charterers are to have the option of using one or two additional neighbouring loading ports or places in the Smyrna district, and that time taken up in shifting ports is to count as lay days, and I have no right either to except Sundays or holidays from the lay days so constituted, or to consider whether the lay days specified in clause 9 had begun to run or not. Mr. Leck suggests that that would be a very harsh way of dealing with this case, because the captain of the ship in fact used the time during which he was shifting in preparing his ship to receive cargo. I am also invited to hold that the ship was not in fact ready to receive cargo until the morning of September 20, and that no time before that ought to be counted. But clause 8 of the charterparty seems to me to provide that the time occupied in shifting is to be counted as part of the lay days, whether the shifting happens on a Sunday or not, and whether it happens before or after the

(1) [1905] 2 K. B. 267, at p. 271.

1907

WHITTALL & CO. v. RAHTKEN'S SHIPPING COMPANY, LIMITED.

Bray J.

lay days specified in clause 9 have begun to run. In my opinion therefore the time occupied in shifting from Smyrna to Chulukioi and from Chulukioi back to Smyrna is to be counted as part of the lay days. I see no words to warrant me in taking any intermediate course. I think that the lay days began to run at noon on September 19, and that in reckoning them from 2 P.M. on that day the defendants are well within their rights.

The answer to the second question depends upon the general law applicable to the construction of clauses similar to clause 9 of this charterparty, and on this point there are several authorities. The first case I have to mention was not reported upon this point. It was the case of *Branckelow Steamship Co.* v. *Lamport & Holt* (1), decided by Lord Russell of Killowen C.J. As I understand the judgment in that case (a shorthand note of which has been read to me), it decides this question in terms. There is nothing to suggest the existence of any special facts distinguishing that case from the present in favour of the charterers. The facts were simply that the parties agreed that work should be done on a Sunday, and it was held that the proper inference was that they had agreed to treat that day as a working day. In the present case the facts are, if anything, more in favour of the shipowners, because it was at the request of the charterers, as shewn by their letter of September 22, that work was done by the ship on Sunday, September 23. According to the judgment of Lord Russell of Killowen C.J., I should be bound to draw, from the mere fact of the captain assenting to that request, the inference that the parties agreed to treat that Sunday as a lay day. The next case was that of *Houlder* v. *Weir* (2), before Channell J., where that learned judge seems to have intimated the opinion that if on Sundays or holidays excepted from lay days by a charterparty work is in fact done without any express agreement as to how those days are to be counted, they still stand as excepted from the lay days. But the same question came before Channell J. again in the recent case of *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.* (3) In that case the learned judge, his attention having

(1) Ante, p. 787. (2) [1905] 2 K. B. 267

(3) Ante, p. 788.

been called to the decision of Lord Russell of Killowen in *Branckelow Steamship Co.* v. *Lamport & Holt* (1), decided that where there is no indication as to the intention of the parties beyond the mere fact that by the assent of both work is done on Sundays or holidays excepted from lay days by the terms of a charterparty, the proper inference to be drawn is that the parties intended to treat those days on which work is so done as lay days.

The result is that as the time occupied in shifting is to be taken into account, and as Sunday, September 23, to say nothing of the holiday on October 4, on both of which days work was done, must also be reckoned, the defendants were right in making the demand they did, and the plaintiffs' action fails.

Judgment for the defendants.

Solicitor for plaintiffs: *J. Robert Greening.*
Solicitors for defendants: *Holman, Birdwood & Co.*

(1) Ante, p. 787.]

W. H. G.

C. A.
1907
March 1.

[IN THE COURT OF APPEAL.]

LLOYD'S BANK, LIMITED *v.* COOKE AND OTHERS.

Negotiable Instrument—Promissory Note—Signature in Blank—Authority to fill up Note to limited Amount—Excess of Authority—Advance by Payees on Faith of Note—Estoppel—"Holder in due course"—Negotiation—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 20.

Where a defendant in an action brought by the payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, and had entrusted the paper to another person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and deliver it to the plaintiffs as security for an advance to be made by them, and that person had fraudulently filled the paper up as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud :—

Held, that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs, and therefore the action was maintainable against him for the full amount of the note.

Herdman v. *Wheeler*, [1902] 1 K. B. 361, discussed and distinguished.

APPLICATION by the plaintiffs for judgment or a new trial in an action tried before Lawrance J. and a jury.

The action was brought upon a joint and several promissory note for 1000*l.* by the plaintiffs as payees of the note against the defendants as makers of it.

The facts as appearing from the evidence and the answers of the jury to questions left to them were as follows :—

The defendant Thomas Henry Cooke had an account with the plaintiffs' bank, and the note had been given to the plaintiffs by him as security for an overdraft for 1000*l.* On applying to them for the overdraft, he had suggested that he could procure the firm of which he was a member and a relative named Sanbrook to join with him in signing a promissory note by way of security for the advance, and the plaintiffs agreed to advance the money on that security. It appeared that the defendant Cooke had thereupon gone to Sanbrook, who was one of the defendants in the action, and, stating that he was applying for an advance of 500*l.* from the plaintiffs' bank, asked Sanbrook to join in giving promissory notes by way of security for it. On Sanbrook's

agreeing to do so, Cooke produced two blank stamped pieces of paper, to which he induced Sanbrook to put his signature, and which were then handed over to Cooke, it being arranged that he was to fill each of them up as a promissory note payable to the plaintiffs for the amount of 250*l*. It did not appear what had become of one of these pieces of paper; but the other, which was the document upon which the action was brought, was filled up by Cooke as a promissory note for 1000*l*. payable to the plaintiffs, the stamp upon it being sufficient to cover that amount, and was signed by him with his own and his firm's name. He then handed it to the plaintiffs, who thereupon made the required advance. The jury found that the note was signed by Sanbrook in blank, that the authority given by him to Cooke was to fill up the two notes for 250*l*. each, and that Cooke in filling up the note for 1000*l*. acted fraudulently. The defendant Cooke did not defend the action. It appeared that he had no authority to sign the promissory note on behalf of the other members of his firm, and judgment was accordingly given for them; and, on the authority of *Herdman* v. *Wheeler* (1), the learned judge gave judgment for the defendant Sanbrook.

Montague Lush, K.C., and *J. B. Matthews*, for the plaintiffs. The plaintiffs are entitled to judgment against the defendant Sanbrook. If it were necessary, the plaintiffs would be prepared to contend that the decision in *Herdman* v. *Wheeler* (1) is wrong; but it is not really necessary for the present purpose to question that decision, because it does not govern this case. It was held in *Herdman* v. *Wheeler* (1) that, in a case like this, there had not been a negotiation of the note, and therefore the case did not come within the proviso to s. 20, sub-s. 2, of the Bills of Exchange Act, 1882, so as to enable the plaintiff to recover on the note. It is contended that in this case, apart from the provisions of the Bills of Exchange Act, 1882, on which *Herdman* v. *Wheeler* (1) was decided, and upon the principles of the common law doctrine of estoppel applicable to all other transactions as well as those embodied in negotiable instruments, the defendant Sanbrook was under the circumstances estopped from denying that Cooke had

(1) [1902] 1 K. B. 361.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE

authority to fill up the note for the amount of 1000*l*. There are rights peculiar to the case of negotiable instruments, which arise by virtue of the law merchant as regards the bona fide indorsees for value of such instruments, and are dealt with by the Bills of Exchange Act, 1882, and which may perhaps be put as resting on estoppel; but there is nothing in the Bills of Exchange Act, 1882, to except negotiable instruments from the common law doctrine as to estoppel stated by Ashhurst J. in *Lickbarrow* v. *Mason* (1), which before the Act would, in a case like this, clearly have applied as between the immediate parties to a negotiable instrument. In the Bills of Exchange Act, 1882, which had for its object the codification of the law peculiar to negotiable instruments, it was of course necessary to deal with the estoppels arising out of the law merchant as regards indorsees, but it was not necessary to deal with an estoppel arising at common law, and which does not depend on any peculiar property of a negotiable instrument. Therefore the doctrine "expressio unius alterius exclusio" is not applicable as regards s. 20 of the Bills of Exchange Act. In *Herdman* v. *Wheeler* (2) for some reason or other the question of a common law estoppel does not seem to have been really argued, and therefore no such question was decided. It seems probable that the point was not open in that case, because it could not be shewn that any authority had been given to the fraudulent person to fill up the note as payable to the plaintiff, but only to fill it up as payable to himself. However that may be, the question was never discussed. The cases clearly shew that prior to the Bills of Exchange Act, 1882, a person who signed a blank stamped piece of paper, and handed it to a person whom he authorized to fill it up as a negotiable instrument, in order that money might be raised on it, was estopped from denying that he had authorized that person to fill it up for the amount which appeared on the instrument. In *Brocklesby* v. *Temperance Permanent Building Society* (3) it was decided that, where securities are handed by the owner to an agent, who is authorized to raise a certain sum on them, and the agent fraudulently deposits them as security

(1) (1787) 2 T. R. 63. (2) [1902] 1 K. B. 361.
(3) [1895] A. C. 173.

for a larger amount, and appropriates the difference, the owner of the securities is estopped from denying that the agent had authority to raise the larger sum. The principle acted on was that, where an agent is entrusted with securities, and is authorized to use them in carrying out the kind of transaction which he did carry out, the fact that a limit was imposed on his authority, unknown to the person who advanced money on the faith of the securities, does not affect that person's right to recover the amount of the advance from the principal. Here Cooke was authorized to procure an advance of 500*l.* by filling up the blank papers, and was therefore carrying out the kind of transaction which he was authorized to carry out; and consequently the case clearly comes within the principle acted on in *Brocklesby* v. *Temperance Permanent Building Society.* (1) [They also cited *Scholfield* v. *Earl of Londesborough* (2); *Union Credit Bank* v. *Mersey Docks and Harbour Board* (3); *Garrard* v *Lewis* (4); *Swan* v. *North British Australasian Co.* (5); *Farquharson Brothers* v. *King & Co.* (6); *Babcock* v. *Lawson* (7); *Carr* v. *London and North Western Ry. Co.* (8); *Nash* v. *De Freville.* (9)]

Amphlett, K.C., and *H. M. Adler*, for the defendant Sanbrook. *Herdman* v. *Wheeler* (10) covers the present case. In this case there was no negotiation of the note, and the plaintiffs were not holders in due course; and consequently they do not come within the terms of the proviso to s. 20, sub-s. 2, of the Bills of Exchange Act, 1882, which only applies to instruments which after completion are negotiated to a holder in due course. That being so, it follows that the plaintiffs cannot enforce the note by reason of sub-s. 2, which provides that "in order that any such instrument"—i.e., one originally signed in blank—"when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given": see

(1) [1895] A. C. 173.
(2) [1896] A. C. 514.
(3) [1899] 2 Q. B. 205.
(4) (1882) 10 Q. B. D. 30.
(5) (1863) 2 H. & C. 175.
(6) [1901] 2 K. B. 697; [1902] A. C. 325.
(7) (1879) 4 Q. B. D. 394.
(8) (1875) L. R. 10 C. P. 307.
(9) [1900] 2 Q. B. 72.
(10) [1902] 1 K. B. 361.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Herdman v. *Wheeler*. (1) The Bills of Exchange Act, 1882, was a codifying Act, intended to exhaust the law relating to bills of exchange, promissory notes, and cheques: see *Bank of England* v. *Vagliano Brothers* (2); and, that being so, s. 20 must be taken to cover all the cases "where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into" such an instrument. Sect. 20 deals with the cases in which an estoppel arises with regard to such an instrument, and the principle "expressio unius alterius exclusio" applies. If the common law doctrine of estoppel was to continue to apply to negotiable instruments, there seems to have been no reason for the insertion of such a provision as the proviso to s. 20, sub-s. 2, in the Act. With regard to the law before the Bills of Exchange Act, 1882, it must be admitted that there are obiter dicta in judgments which may appear favourable to the view put forward by the plaintiffs, but the cases of this kind, in which it was actually held that the plaintiff could recover on the instrument, appear to have all been cases in which it had been negotiated, and was in the hands of a bona fide indorsee for value without notice. Until an instrument such as this has been negotiated, and as between the immediate parties to it, it stands on the same footing at common law as any other document, such as a transfer or conveyance, which was signed in blank; and various authorities shew that the mere fact that a defendant has put into the hands of a person means of committing a fraud does not estop him at common law from denying the validity of the document: *Lewis* v. *Clay* (3); *Awde* v. *Dixon*. (4) The term "negotiated" is not applicable to the delivery of a negotiable instrument as between immediate parties. In *Brocklesby* v. *Temperance Permanent Building Society* (5) the documents entrusted to the agent were the title-deeds of land, the possession of which may be taken prima facie to indicate a title to deal with the land. [They also cited *Ex parte Swan* (6); *France* v. *Clark* (7); *London and South Western Bank* v. *Wentworth*. (8)]

(1) [1902] 1 K. B. 361.
(2) [1891] A. C. 108.
(3) (1897) 14 Times L. R. 149.
(4) (1851) 6 Exch. 869.
(5) [1895] A. C. 173.
(6) (1859) 7 C. B. (N.S.) 400.
(7) (1884) 26 Ch. D. 257.
(8) (1880) 5 Ex. D. 96.

Montague Lush, *K.C.*, for the plaintiffs, was not called upon to reply.

COLLINS M.R. This is a case of some importance and difficulty, more especially having regard to the fact that, from one point of view, it might involve the question whether the considered judgment of the Divisional Court in *Herdman* v. *Wheeler* (1), upon the authority of which the learned judge at the trial acted, was correct. The action is brought by the payees against the makers of a promissory note, but the only question that arises on this appeal is with regard to the liability of the defendant Sanbrook. The question arises in the following manner. The defendant Cooke, a fraudulent person in need of money, induced the defendant Sanbrook to sign two blank stamped pieces of paper for the purpose of enabling him to obtain an advance of 500*l.* from the plaintiffs' bank. The filling up of the pieces of paper so signed was left to Cooke, it being agreed that he was to fill each of them up as a promissory note payable to the plaintiffs for 250*l.* Cooke filled up one of them, upon which the present action is brought, as a promissory note for 1000*l.* payable to the plaintiffs, and, upon that being handed to the plaintiffs, they gave him credit for the sum of 1000*l.* The question is whether the plaintiffs can recover as against Sanbrook upon that document or not. The case as developed on the pleadings stands thus. The defendants are sued as makers of the note. The defendant Sanbrook alleges that it was filled up as it was by the defendant Cooke without his authority. The plaintiffs reply that, having regard to the circumstances under which his name came to be upon the note and under which they advanced their money, he is estopped from setting up that defence.

The question appears to me to be purely one of estoppel at common law. It has been contended that the common law doctrine of estoppel does not apply, and that, in the case of a negotiable instrument, the rights of the parties must be ascertained solely by reference to the provisions of the statute relating to such instruments, and that, upon the true construction of those provisions, the plaintiffs cannot maintain the action against

(1) [1902] 1 K. B. 361.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Collins M.R.

the defendant Sanbrook. As an authority for that proposition, and as governing this case, *Herdman* v. *Wheeler* (1) was cited. The circumstances of that case were very nearly the same as those of the present case, though possibly some distinction might be suggested; and it was there held that no action could be maintained by the payee of the note against the maker. That case involved the consideration of the true construction of the Bills of Exchange Act, 1882, and the question whether, upon that construction, the plaintiff was a "holder in due course" of the note, or a person to whom it had been "negotiated"; and the Court were of opinion that, under the circumstances of the case, there had been no negotiation of the note, and therefore the plaintiff was not in a position to maintain an action upon it, and they gave judgment accordingly. I do not think it is necessary for us in the present case to treat the rights of the parties as having to be ascertained by reference to the provisions of the Bills of Exchange Act, 1882, which were considered in *Herdman* v. *Wheeler* (1), because, in my opinion, the common law doctrine of estoppel applies, and the rights of the parties may be decided by reference to that doctrine, without giving any opinion as to the correctness of that decision. At the trial this case seems to have been decided entirely on the authority of *Herdman* v. *Wheeler* (1), and the question of the existence of an estoppel at common law does not appear to have been discussed. Therefore, if we arrive at a different conclusion from the learned judge at the trial, we shall not really be impugning anything that he said, because his mind never seems to have been directed to the question of estoppel.

That the doctrine of estoppel is applicable to circumstances such as existed in this case appears to me to be conclusively established by an authority which we could not question if we were disposed to do so, namely, the decision of the House of Lords in *Brocklesby* v. *Temperance Permanent Building Society*. (2) The head-note in that case is as follows: "Where a principal entrusts an agent with securities, and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently appropriates the difference (the lender acting

(1) [1902] 1 K. B. 361. (2) [1895] A. C. 173.

bona fide and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no enquiry." That case seems to me to be a stronger one than the present; and, unless the doctrine of estoppel is excluded here by reason of the fact that in this case the document was, or was intended to become, a negotiable instrument, it appears to me to be conclusive of the present case. Here the defendant Sanbrook signed a paper which he intended to be made use of as a security for an advance, and handed it to the defendant Cooke, authorizing him, as his agent in effect, to fill it up and raise money upon it. Cooke exceeded the authority so given to him, because, instead of confining himself to the authorized amount, he raised a larger sum of money upon the instrument. That appears to me to be in substance precisely what happened in the case of *Brocklesby* v. *Temperance Permanent Building Society*. (1) It was there held that the lender, who had advanced to the fraudulent agent, on the faith of certain securities entrusted to him for the purpose of raising money upon them, a larger amount than he was authorized to borrow, was nevertheless entitled to hold the securities until the whole sum of money which he had advanced was paid. It seems to me to follow that in this case, as between the plaintiffs and the defendant Sanbrook, who had authorized Cooke to fill up the paper signed by him and obtain an advance from the plaintiffs upon the faith of it, the plaintiffs are entitled to treat the whole sum of 1000*l.* as properly advanced to Cooke by his authority, and therefore as recoverable by the plaintiffs from him. It makes no difference, as it seems to me, in point of principle, that the particular remedy which the lender was in the case of *Brocklesby* v. *Temperance Permanent Building Society* (1) seeking to assert was the right to hold the securities by way of lien until the whole of the money advanced was paid, whereas in the present case the plaintiffs are asserting a right to sue the person who authorized the fraudulent agent to deal with the security for the whole amount advanced by them. What the

(1) [1895] A. C. 173.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Collins M.R.

House of Lords decided in principle was that the lender is in such a case entitled as against that person to repayment of the whole sum advanced. So looked at, that case appears to me to shew that, apart from the construction of the sections of the Bills of Exchange Act, 1882, upon which the case of *Herdman* v. *Wheeler* (1) turned, at common law there is an effectual estoppel as against a person who, like the defendant Sanbrook, has entrusted an agent with securities for the purpose of obtaining on the faith of them an advance of money up to a certain amount, even though the agent uses them as the means of obtaining a larger advance. The case of *Brocklesby* v. *Temperance Permanent Building Society* (2) appears to me to be a direct authority on the facts of the present case.

So far from the fact that the document, which was handed to the agent for the purpose of being used as a security, was a negotiable instrument, or was intended to become one, being a reason why the lender of the money should be placed in a worse position for asserting a right on the ground of estoppel, it appears to me to be quite the contrary. I think that all the elements which form the foundation of the estoppel are more easily visible where the instrument which is handed over to be used as a security for an advance is in the form of a negotiable instrument than where it is otherwise; for the intention that the security should be used as a means of raising money is more clearly indicated where the document is in its very nature one which is intended to be transferable from hand to hand as a security for money. The proposition is well established by many cases that a person who puts his name on a blank paper stamped as a negotiable instrument incurs large responsibilities towards anyone who may make an advance on the faith of his signature. This has been frequently the subject of observation in the Courts. I will only refer to one passage as indicating the attitude of the Courts on this matter. In *Baxendale* v. *Bennett* (3) Brett L.J. said: "The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will

(1) [1902] 1 K. B. 361 (2) [1895] A. C 173.
(3) (1878) 3 Q. B. D. 525, at p. 531.

cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable." It seems to me that these observations are applicable to the instrument in the present case, which, even if it cannot be considered as having been negotiated, appears to me to stand in the same category as if it had been, for the purpose of raising all those implications on which this particular ground of estoppel is founded. It was intended to have all the properties of a negotiable instrument, and as such to be capable of passing from hand to hand as part of the currency, for the purpose of raising money upon it, and the fact that it cannot be treated as having been negotiated does not appear to me to affect the particular liability here asserted. There is nothing, in my opinion, in the law as to negotiable instruments as contained in the Bills of Exchange Act, 1882, to prevent the transaction in the present case from being subject to this common law doctrine of estoppel, because the document which was handed over for the purpose of procuring the advance was in the form of a negotiable instrument. I do not think that, in deciding as I do, it is necessary to differ from the judgment in *Herdman* v. *Wheeler*. (1) I doubt whether in that case the doctrine of estoppel could have been set up by the plaintiff. I need not, therefore, discuss the grounds of the decision in that case, and I think we may rest our decision on *Brocklesby* v. *Temperance Permanent Building Society*. (2) Consequently I will pronounce no opinion on the question whether the plaintiffs were entitled to succeed as against the defendant Sanbrook by virtue of the provisions of the Bills of Exchange Act, 1882. On these grounds I think that the application of the plaintiffs for judgment must be allowed.

COZENS-HARDY L.J. I am of the same opinion, and have not much to add. Like the Master of the Rolls, I desire to keep

(1) [1902] 1 K. B. 361. (2) [1895] A. C. 173.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Cozens-Hardy L.J.

an open mind as to the correctness of the decision in *Herdman* v. *Wheeler* (1), because, from the point of view which I take, it is not necessary to discuss that case. It seems to me that the present case can, and ought to, be decided by the application of the well-known doctrine of estoppel by conduct, a doctrine which is applicable to all transactions, unless it is excluded by some express statutory provision, and which really is, after all, only a branch of the law of evidence. I find it difficult to see what possible answer can be made to the claim of plaintiffs who, like those in the present case, produce a promissory note which admittedly bears the signature of the defendant, who admittedly signed it in blank and handed it over to another person with the express intention that the amount to be payable on it and the name of the plaintiffs as payees should be filled in by that person, and that money should be borrowed upon it by him from the plaintiffs. A document which, under such circumstances as these, has been signed and handed to an agent for the signer—for that was really Cooke's position in the matter—for the purpose of his borrowing money on it, must, in my judgment, on the ground of estoppel, be treated as having been filled up in accordance with the authority given by the signer of it. The essential principle of the law of estoppel being that a person cannot be allowed to set up the truth of the matter in a case where by his conduct he has rendered it unjust and unfair that he should do so, I think that a person who has acted as the defendant Sanbrook did cannot, as against those who advanced money on the faith of the instrument signed by him, be allowed to say that his agent exceeded the authority given to him. It is urged that, the document in question here being a negotiable instrument, the doctrine of estoppel is in this case excluded, because its application, as regards such instruments, is limited to the cases mentioned in the Bills of Exchange Act, 1882, s. 20. Whether this note can be considered to have been negotiated or not, it is not, I think, necessary to decide; but the view so put forward for the defendant does not appear to have been that taken by the Court of Appeal in *Nash* v. *De Freville* (2), in proof of which I may

(1) [1902] 1 K. B. 361. (2) [1900] 2 Q. B. 72.

refer to the first part of the judgment of Collins L.J. (1), as he then was, in which he seems to have fully considered the application of the common law doctrine of estoppel to that case, and to have stated that, in his opinion, the case was governed by the doctrine of estoppel, though he afterwards proceeded further to deal with it from another point of view. I think, therefore, that on the point with regard to estoppel, which does not seem to have been discussed in the Court below, the plaintiffs are entitled to judgment against the defendant Sanbrook.

FLETCHER MOULTON L.J. I am of the same opinion, and I agree with the reasons given by the Master of the Rolls and Cozens-Hardy L.J.; but I wish to add a few observations with reference to the argument based upon s. 20 of the Bills of Exchange Act, 1882, which was pressed upon us by the counsel for the defendant Sanbrook. In cases in which a blank stamped paper has been signed and delivered by the signer in order that it may be converted into a bill, sub-s. 2 of s. 20 provides that "in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given." It was urged that this provision is an absolute limitation upon all claims based on such an instrument (whether by way of estoppel or otherwise), and that the only way in which a person so claiming can escape from that limitation is by bringing himself within the proviso to the sub-section, which provides that "if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given," and it was contended that the plaintiffs had failed to bring themselves within the words of this proviso because they were not "holders in due course."

In order to agree with this view, one would have to come to the conclusion that it was intended by the Bills of Exchange Act, 1882, to make an essential change in the law with regard to

(1) [1900] 2 Q. B. at pp. 84-6.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Fletcher Moulton L.J.

negotiable instruments by shutting out the payee of such an instrument, who had given full value without notice of anything wrong, from the advantages of the position of a bona fide holder for value. Before the Bills of Exchange Act, 1882, it would, in my opinion, have been impossible to contend that a payee of a promissory note who took it under circumstances such as existed here was not entitled to recover the full amount of the note from the maker of it. A long line of most emphatic judgments shews that, before the Act, a person who, like the defendant Sanbrook, chose to sign a bill or note in blank, and hand it to another person to be filled up, would, under circumstances such as exist in this case, be liable to the payee for the full amount for which the instrument was filled up, provided that it was not greater than the stamp would cover, so that an action such as this would then have been an undefended action. The contention of the counsel for the defendant amounts, therefore, to saying that the Act has made this important change, namely, that it has taken away the right of a payee to recover under such circumstances, leaving only the rights of an indorsee in this respect unchanged.

I cannot accept that view. I can see no indication in the Act of any intention to make such a radical change in the law, a change which does not commend itself to one's sense of justice, and which, if intended, would surely have been made formally and explicitly, and not left to be gathered by mere implication. And, apart from the absence of any indication that such a serious change in the law is intended to be made, there are many things in the Act which lead me to the opposite conclusion. In the first place, I am satisfied that the term "holder in due course," which is used in the Act, is intended to be the equivalent of the term "bona fide holder for value" which was used prior to the Act, and which would, in my opinion, have included a payee who had given full value for the bill or note in good faith. This appears from the judgment of Lord Selborne in *France* v. *Clark* (1), in which he uses the expression "bona fide holder for value" in a sense which must include a payee who has given value in good faith. He says: "The person who has signed a

(1) 26 Ch. D. 257, at p. 262.

negotiable instrument in blank or with blank spaces is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document after it has left his hands by filling up blanks (or otherwise in a way not ex facie fraudulent) as against a bona fide holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a bona fide holder." Now, as I have said, the Courts always held a payee entitled to the benefit of this estoppel if he took the instrument bona fide and without notice, and therefore we have the authority of Lord Selborne in favour of the view that the term "bona fide holder for value" may include a payee; and, if the term "holder in due course" in the Bills of Exchange Act, 1882, is intended to be the equivalent of "bona fide holder for value," it must include such a payee.

But it will perhaps be said that one ought not primarily to be guided in the interpretation of such an Act by considerations of what was the previous state of the law. The Act in its definition clause defines in a statutory manner the meaning of the terms used in it, and, although there is a strong presumption against any serious change in the general law being intended, it is, after all, a question of the interpretation of the statute, and these definitions must be implicitly followed. This is true, but the application of this principle only strengthens the view I have enunciated. When I look at the definition of "holder" in the Bills of Exchange Act, 1882, s. 2, I find that, so far from its indicating any intention to create a difference of status between a holder who is a payee and a holder who is an indorsee, or to put a payee in any worse position in this respect than an indorsee, the contrary is the case. The Act takes special care to place them on an equality, for it defines "holder" as meaning the "payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." Therefore, unless the context compels us to do otherwise, we must construe the term "holder" as including a payee. I next find that in s. 30, sub-s. 2, of the Act it is provided that "every holder of a bill is prima facie deemed to be a holder in due course," and that, if it is wished to dislodge him from that position, it must be shewn that there

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Fletcher Moulton L.J.

has been fraud or some other like circumstance in connection with the bill before it reached his hands, and even this only shifts the burden of proof and makes it incumbent on him to prove that he gave value in good faith.

These provisions specifically give to the payee the prima facie status of a "holder in due course," and, if he can shew that value has in good faith been given by him for the bill, that prima facie status cannot be displaced.

It is suggested, however, that these conclusions are negatived by the language of s. 29, sub-s. 1, which states the conditions under which a person is a "holder in due course." I can find nothing in the language of that sub-section which throws any doubt on the view that "holder in due course" would include a payee who has given value in good faith, unless we are to construe the word "negotiated" as being merely equivalent to "indorsed." But, when the definition of "negotiation" given by s. 31, sub-s. 1, is looked at, it appears clear that the Legislature intended to make it apply also to the original operation of transferring the bill to the payee. It lays down that "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." It carefully abstains from prescribing that the transferor must be a "holder." All that is necessary to constitute "negotiation" of the bill is that it should have been transferred from one person to another in such a manner as to constitute the transferee the "holder of the bill," i.e.—if we replace "holder" by its definition in the Act—"the payee or indorsee who is in possession of the bill." A cheque, therefore, payable to a particular person, which is handed by the drawer to that person for value, would be "negotiated" within the meaning of the Act.

These considerations lead me to the conclusion that the Act did not intend to impair the position of a payee as contrasted with that of an indorsee, and that a payee who has given value in good faith is intended to come within its provisions as a "holder in due course" just as much as an indorsee. Finding, therefore, no indication in the Act of any intention to interfere with the position of a payee of a negotiable instrument in this respect, I arrive with some confidence at the conclusion that, in

the circumstances of a case like the present, such a payee since the Act still occupies the favourable position which he would have had before the Act by virtue of the law of estoppel as applied to a case where a promissory note has been signed in blank by the maker and entrusted to another person to fill up.

C. A. 1907

LLOYD'S BANK, LIMITED v. COOKE.

Application allowed.

Solicitors for plaintiffs: *May, How & Chilver, for Lloyd & Son, Leominster.*

Solicitor for defendant: *Alfred Jonas, for John Moore, Hereford.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Jan.* 25, 26.

MOEL TRYVAN SHIP COMPANY *v.* KRUGER & CO.

Ship—Charterparty—Bill of Lading—Duty of Charterer to present proper Bill of Lading—Variance between Charterparty and Bill of Lading—Liability of Shipowner to Holder of Bill of Lading—Action by Shipowner against Charterer for Recovery of Loss—Indemnity—Breach of Contract.

The defendants chartered the plaintiffs' ship to load a cargo of rice at Rangoon for delivery at Rio de Janeiro. The charterparty contained a negligence clause, and provided that the master should sign clean bills of lading at any rate of freight without prejudice to the charterparty. The defendants at Rangoon presented to the master for signature bills of lading containing no negligence clause, and the master signed the bills of lading in this form, both parties believing, wrongly, that the charterparty negligence clause was incorporated into the bills of lading. On the voyage to Rio de Janeiro the ship was stranded through the negligence of the master, causing a loss of cargo, in respect of which the holders of the bill of lading recovered judgment against the plaintiffs, who by this action claimed an indemnity from the defendants:—

Held, that the defendants, in presenting and obtaining the signature of bills of lading which, in the hands of third parties, imposed on the plaintiffs a greater liability than was imposed by the charterparty, had committed a breach of contract which caused damage to the plaintiffs, in respect of which they were entitled to recover.

Per Buckley L.J.: The plaintiffs were also entitled to recover on the ground of a right to indemnity.

Decision of Phillimore J., [1906] 2 K. B. 792, affirmed.

APPEAL from a decision of Phillimore J. (1)

By a charterparty dated in London, April 22, 1903, the

(1) [1906] 2 K. B. 792.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

defendants chartered the plaintiffs' ship the *Invermore* to load a cargo of rice at Rangoon, and being so loaded, to proceed thence to Rio de Janeiro and there deliver the cargo. The material clauses of the charterparty were as follows :—

"6. The act of God, perils of the sea, fire, barratry of the master and crew, the King's enemies, pirates, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners.

"7. The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight, without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading."

"25. Charterers' liability under this charter to cease on ship being loaded, provided the cargo is worth the freight, the owners having an absolute lien on the cargo for all freight, dead freight, demurrage, average, and any other lawful claim they may have under this charter, which lien they are hereby bound to exercise."

The *Invermore* loaded a cargo of rice at Rangoon, and the defendants by their agent, Mr. Scharnhorst, presented to the master for his signature bills of lading, dated July 11, 1903, in the printed form used by the defendants, which provided that the cargo was to be delivered at Rio de Janeiro, "the act of God, the King's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted, unto order or its assigns, freight for the said goods and all other conditions as per charterparty dated London, April 22, 1903." The master signed the bills of lading in the form in which they were presented to him.

The circumstances attending the signature of the bills of lading were stated in the evidence of the master and Mr. Scharnhorst. The master stated that he asked Mr. Scharnhorst whether the ordinary clause "as per charterparty" was contained in the bill of lading, and when he ascertained that it was he thought that that would cover negligence and all the

other exceptions in the charterparty. He had always seen the negligence clause in the charterparty, but, so far as he was aware, he had never seen it in the bill of lading. Mr. Scharnhorst stated that in his opinion it was immaterial to the defendants whether the bills of lading contained the negligence clause or not. It was the custom of the defendants to present bills of lading without the negligence clause, but if the captain required the negligence clause to be inserted he always inserted the clause without the slightest hesitation, and he kept a rubber stamp to put it on if required. Many captains never asked for the negligence clause, but others did. He had never considered the question from the shipowner's point of view.

In the course of the voyage from Rangoon to Rio de Janeiro the *Invermore* stranded through the negligence of the master, and the ship and cargo became a total loss.

By reason of the bills of lading containing no negligence clause the holders of the bills of lading recovered judgment against the present plaintiffs in the Admiralty Court in respect of the loss of cargo, the damages being assessed under the provisions for the limitation of liability at 12,175*l.* 12*s.* The plaintiffs thereupon brought this action for damages against the defendants for breach of duty as agents of the plaintiffs.

The plaintiffs in their points of claim alleged (par. 5) that it was the defendants' duty as charterers to present to the master for signature bills of lading in accordance with the terms of the charterparty, but that the defendants, in breach of their said duty so to do, presented to the master for signature bills of lading which did not incorporate the exception "stranding and other accidents of navigation excepted, even when occasioned by the negligence of the master," and they claimed an indemnity against the amount payable by them to the holders of the bills of lading by way of damages and costs.

The defendants in their points of defence denied that either as charterers or otherwise they were under any duty to the plaintiffs with regard to the form of the bills of lading to be presented to the master for his signature, and further alleged that the damages were not caused directly or at all by any act or default of the defendants.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

Phillimore J. held that the plaintiffs were entitled to the indemnity which they claimed.

The defendants appealed.

J. A. Hamilton, K.C., and *Lush, K.C.* (with them *A. H. Chaytor*), for the defendants. It is the charterparty which determines on what terms the shipowner has undertaken to sign by the hand of the captain bills of lading. If, as is customary, he has expressly stipulated for an indemnity, he gets it, but if not, the relation of the parties is such as to negative an implied indemnity. The effect of the decision of the Court below is to add a new term to the contract. There being no other agent of the shipowner on the spot, it was the captain's business to scrutinize the bills of lading and see that they contained proper exceptions to protect his principal: *Stumore, Weston & Co.* v. *Breen.* (1) Phillimore J. has based his judgment on implied indemnity. As a general rule, in order to raise an implied indemnity there must be a request by one party to another to do an act for the accommodation of the first party which that other party was not bound to do, and the request must be made under such circumstances as to justify the inference that the intention of the parties was that the party obeying the request should be indemnified: *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (2); *Dugdale* v. *Lovering* (3); *Ex parte Ford.* (4) Here there was no request for an accommodation, and no reliance upon such request, within the principle of those cases. The only request to the captain was to carry out his contract, and that there was no intention that there should be an indemnity is clear, since both parties were under a common misapprehension as to the legal effect of signing the bills of lading in the form in which they were signed. The only exception to the general rule above stated is where the request is to perform a ministerial duty, in which case the law will imply an indemnity apart from the intention of the parties: *Sheffield Corporation* v. *Barclay.* (5)

(1) (1886) 12 App. Cas. 698.
(2) (1886) 34 Ch. D. 261, 274.
(3) (1875) L. R. 10 C. P. 196.
(4) (1885) 16 Q. B. D. 305.
(5) [1905] A. C. 392.

Even assuming that the captain was bound to sign the bills of lading in the form in which they were presented to him, as seems to have been the view of the Court in *Hansen* v. *Harrold Bros.* (1), this was not a request to perform a ministerial duty within the meaning of *Sheffield Corporation* v. *Barclay* (2), because here the duty arose out of an existing contract. Therefore the decision of the House of Lords does not apply. That case is also distinguishable, because here both parties were in the same state of ignorance and had the same means of knowledge, and the indemnity asked for is an indemnity, not to the captain, but to the shipowner. It may be that the words in the charterparty "without prejudice to the charter" relate only to the rate of freight; but, assuming that they apply generally to the bill of lading, they mean without prejudice to enforcing the terms of the charterparty as it stands, and do not imply a covenant to indemnify if the bill of lading does not conform to the charterparty. In this case there can be no implied indemnity, because the parties are bound by a contractual tie which leaves out altogether any reference to an indemnity in respect of this class of acts.

Scrutton, K.C., and *Bailhache*, for the plaintiffs. By the charterparty, as between the shipowner and the cargo owner, the negligence of the master is to fall on the cargo owner; but the cargo owner wants another document by which he can sell the goods afloat, or, if the goods are sold, can transfer the property in those goods afloat. The shipowner has nothing to do with that. Until the bill of lading is indorsed, as between the cargo owner and the shipowner, that document makes no difference in the rights of the parties. Then, is it to be assumed that the shipowner would contract that, as between himself and the cargo owner, he should not be liable for the negligence of his servant, yet that as soon as the goods are sold he should take upon himself that responsibility, especially having regard to the words "without prejudice to the charterparty"? Is it not more natural to assume that if the cargo owner wants a bill of lading the shipowner will only give it upon the terms that the rights, as between him and the cargo owner, shall remain as before? That

(1) [1894] 1 Q. B. 612. (2) [1905] A. C. 392.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

is the business view of the matter. That being so, the case may be put (as it is put in par. 5 of the points of claim) on the duty of the charterer to present a proper bill of lading, or on indemnity, and if on indemnity, under either of two heads: If the master was bound to sign the bill of lading in the form in which it was presented, it was a ministerial act, and the principle of *Sheffield Corporation* v. *Barclay* (1) applies; if he was not so bound, but signed at the request of the charterers, then the principle of *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (2) applies.

As regards the first alternative, it must be admited that there is no authority directly in point, but the duty to present proper bills of lading follows from the charterparty; otherwise, if the terms of the charterparty can be eliminated by a bill of lading in different terms, what would be the use of inserting those terms in the charterparty? Under the clause allowing bills of lading to be signed there is no power to vary the terms of the charterparty except as regards the matters therein mentioned, which do not touch the point at issue. Therefore the charterer has presented to the master for signature bills of lading which he was not entitled to present, because they did not afford the shipowner the protection he had bargained for. That in itself would do no harm, but that followed by the indorsing of the bills of lading when signed does, and those two steps together constitute a breach of contract.

[FARWELL L.J. *Oriental Steamship Co.* v. *Tylor* (3) is in favour of that view.]

Rodocanachi v. *Milburn* (4) also shews that, as between the shipowner and charterer, in cases of variance between the charterparty and the bill of lading, the charterparty is to prevail.

Hamilton, K.C., in reply. It is said that the charterparty implies an obligation on the charterer to present proper bills of lading, but no such obligation is to be found in the contract, and, assuming that a breach of contract has been committed, the damages arose, not from the presentation of the bill of lading, but from the negligence of the captain.

(1) [1905] A. C. 392.
(2) 34 Ch. D. 261, 274.
(3) [1893] 2 Q. B. 518, 527.
(4) (1886) 18 Q. B. D. 67.

SIR GORELL BARNES, PRESIDENT. This case has been admirably argued, and the points which we have to consider have been brought very clearly before us. The case is one of some interest and some difficulty; but, having come to a conclusion upon it, I do not think it worth while to reserve consideration of the case any further. [The President referred to the exceptions in the charterparty and in the bill of lading and stated the facts which gave rise to the present action, and he continued as follows:—] The mere statement of the facts shews the difficulty which has arisen, and I think, in order to appreciate that difficulty and in order to apply the law to the solution of it, it is necessary to see exactly how this matter stands looked at from a legal point of view. In former times a difficulty of this kind could not have arisen, because the bill of lading given under a charterparty had really no effect upon the contractual relationship between the shipowner and the charterer; it was a receipt for the goods, and the whole relationship of the two parties was governed by the contract contained in the charterparty. If, as business required it, the charterer passed the bill of lading over to a consignee or purchaser, and a dispute arose at the port of delivery or about the loss of the goods, there were only two ways of dealing with the difficulty so far as it affected the purchaser or consignee of the cargo. The action for the loss of the goods would have to be brought in the name of the original contractor who shipped the cargo and made the charterparty; or, if the goods had been delivered at the port of destination, there were cases in which, from the fact of delivery and the abandonment of the lien for freight and so forth by the shipowner in making delivery, a contract was implied against the consignee to recover freight. But where the difficulty arose with regard to non-delivery, as in a case of loss like this, the remedy would have to be enforced in the name of the original contractor. Then came the Bills of Lading Act, 1855, which gave the same rights of suit to a person who was the consignee of goods named in a bill of lading, or indorsee of a bill of lading, to whom the property in the goods passed upon or by reason of the consignment or the indorsement, and subjected him to the same liabilities as if the contract contained in the bill of lading had been made with himself. I do

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

The President.

not know that that was strictly a correct form of expressing the matter, but in substance the Act treated the original shipment under the bill of lading as a contract which could be transferred, and which did, when transferred, give rights to the person to whom it was transferred. It is by virtue of those powers that in the present case the transferees of the bills of lading acquired the right to sue, their rights being based solely upon the bills of lading, and not being controlled by the charterparty, except, of course, if the goods had been delivered, so far as the conditions of the charterparty affected the delivery. That is how a suit against the shipowner came to be brought, and there was no answer to it as soon as negligence could be proved which caused the loss.

The difficulty in the present case has arisen because the persons who presented this bill of lading do not seem to have appreciated that situation, and do not seem to have appreciated that the bill of lading which was being issued would not protect the shipowner from loss by negligence, although it is quite obvious from the evidence that the point as to whether the negligence exception should be put in had over and over again been brought before them—they say some captains asked for it and others did not. Both they and the captain seem to have considered that the fact of putting on the bill of lading "all other conditions as per the charterparty" would have the effect of making all the exceptions and all the liabilities and rights practically the same as they were in the charterparty. I am very much surprised to hear that that was the state of things existing in Rangoon. More than twenty years ago shipowners were sued—one might say almost day after day, certainly week after week, I should think—by underwriters using the name of cargo owners for losses caused by negligence in navigation, and there was, speaking from my memory of it, almost a common form in which that action was brought. There was a Board of Trade inquiry which disclosed circumstances of negligence by reason of which a ship had, for example, got on a rock; then an action was brought, particulars of the negligence were taken from the Board of Trade inquiry report, interrogatories were then administered to the shipowner which he was compelled to

answer by asking his captain for the information necessary to answer them—those answers usually put him out of Court on the question of negligence, because he had to admit the facts; then a well-known expert was called in as a witness to expound to the jury how it was that there was negligence, and what ought to have been done, and a verdict for the plaintiff followed almost as a matter of course. That mode of procedure produced verdicts for plaintiffs for many hundreds of thousands of pounds, and the result was that in 1885, if I remember the date rightly, there was a conference to stop this, and as the result of the conference the negligence clause was inserted in nearly every bill of lading after that time, and steps were taken to insist upon its being done. I am surprised to find that that does not seem to have been adequately realized in Rangoon, and that the defendants appear to have thought that it was sufficient to put in "other conditions as per charterparty," which over and over again has been decided not to control the exceptions in the bills of lading, and bring in the exceptions in the charterparty.

That being the position of things, the question which we have to determine is, What are the rights of the parties in this matter?

It is only necessary for me to refer to one or two clauses of the charterparty. I have already read the exception clause. [The President read clauses 7 and 25, and continued:—] The first question, to my mind, is whether what has taken place has been in consequence of any breach by the charterers of the obligations which they undertook under that charterparty. There is a subsidiary point whether, if there was a breach by having bills of lading prepared and signed in the way in which these were, the damages flowed from that breach, but that latter point, I think, is really without substance; it can hardly be contested, I think, having regard to the nature of this case, that, if there was a breach, and if these bills of lading were taken in the way they were, and indorsed over by the charterers to persons having greater rights than they themselves had against the shipowners, the damages which happened in this case would flow therefrom. The real question is whether there has been a breach. Of course, the case may be put in another

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

The President.

way, which I will deal with presently; but the first, and, I think, the main, question is whether there has been a breach of contract by the charterers.

Now it is obvious that the charterparty itself, if the charterers remained the owners of this cargo, placed the risk of the carriage of the goods on them, even when one of the perils which are enumerated was occasioned by the negligence of the master, or pilot, or mariners, or other servants of the shipowners. The risk of loss, therefore, in that event was contemplated by the charterparty as being cast upon the charterers, and there is this observation to be made in approaching the construction of this charterparty, that there are three different parts of it to look at. The first part deals with the performance of the contract up to the time of loading. Until the ship is loaded the charterers must perform all that is stipulated for with regard to the loading. As soon as the loading is completed, they can get rid of their liability by properly preserving the lien on the goods in favour of the shipowners by virtue of the 25th clause. That does not come into operation so far as to require anything to be done by the shipowners until the vessel arrives at her port of destination, when they may have to put in force such remedies by way of lien and otherwise as they have against the consignee to whom the bills of lading have been transferred, and who has to discharge whatever liens or rights are preserved against him under those bills of lading. That is the second part. The third part is that which relates to the transit from the one port to the other, and that is dealt with substantially by the exceptions, which, of course, are exceptions out of the contract that the goods are to be carried properly and safely from the shipping port to the port of destination.

I think it is necessary to bear those matters in mind in seeing what ought to be done as a matter of business under a contract of this kind. Up to the time of shipment the shipowner deals with the shipper. From the moment of shipment he wants to be in the same position as regards carrying the goods, whether the goods remain the property of the shipper or whether the shipper chooses to sell them and pass the property to someone else. That is a matter of common sense. He certainly does not

desire—no shipowner would desire—that he is to be under one set of obligations to the charterer, and to be under heavier obligations if the charterer chooses to sell his goods. That, I should say, to use a common expression, is not business. Therefore it is natural to look at this contract to see whether there is anything in it which would shew that there is any such bargain or that any such right is given to the charterer to alter the position of the shipowner.

It seems to me then that we have only to consider the terms of the contract, and to apply to the terms of the contract one or two well-known propositions.

The first of these propositions is that a master of a ship, when she has been chartered by her owners to a charterer, has no right to alter that charterparty or to depart from its terms. The ship is to be employed on that charterparty, and everything that has to be done in connection with her must be done under that charterparty, and that is the limit of the master's authority in my opinion. I am not of course dealing with a case where goods have been shipped under bills of lading without notice of a charterparty. The second is, that, as a matter of business—and it necessarily must be so—the charterer has to prepare the bills of lading; he has to select how many parcels of goods he wishes the shipment to be divided into, and whether he will send the bills of lading to certain specific persons named or have them made out to order and indorse them. It is obvious that it must be for the charterer, if he wishes to have bills of lading signed, to make out the bills of lading and tender them for signature. The third point is that the provision that there shall be bills of lading at all is a provision which, in my opinion, is introduced entirely for the benefit of the charterer. So far as the shipowner is concerned, it does not matter to him whether there are bills of lading or not. If the cargo is shipped under the charterparty, and nothing is said at all, he is bound to carry it and to deliver it to the person to whom he has contracted to deliver it, or to that person's authorized representative. But, as a matter of business, for centuries past bills of lading have been adopted as a means to enable persons presenting a voucher at the port of delivery to

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

The President.

obtain the cargo, and at the present time the bill of lading not only operates as a voucher, but confers the right to obtain the cargo under the Bills of Lading Act, 1855.

That being so, it is obvious, to my mind, that it is for the benefit of the charterer that the charterparty should contain a clause authorizing the master to sign bills of lading, which he does to facilitate the charterer in carrying out the objects which he has in view. Bearing in mind these three things, that the master has no right to depart from the charter, that the charterer has to prepare the bills of lading, and that it is for his benefit that he should have such documents, I think it follows almost as a matter of course that, if bills of lading are to be signed, he is under an obligation by virtue of the terms of the charterparty to prepare such bills of lading as are in accordance with it; in other words, bills of lading which will not impose upon the shipowner with regard to the transit (which is what the shipowner from the time of the signature of the bills of lading requires to deal with) any greater responsibility than he undertook to the charterer. I think myself that to apply this charterparty in any other way to the rights of the parties would be to produce very considerable difficulty. One contention—it is hardly a contention, but perhaps a suggestion—was that it might possibly be said that the clause as to signing bills of lading might mean signing usual bills of lading. If that were so, I think great difficulty would arise, because it is obvious in this case that there were bills of lading in two forms, one with the negligence clause in it and one without the negligence clause in it, and who would be the person to settle then which was usual? My view is that the matter cannot be left loosely in that way, and that the contract is that the bills of lading shall be in accordance with the contract contained in the charter.

Now I have pointed out that until the bills of lading are indorsed it makes no difference in what terms they are. They may have as many exceptions as you please, whether greater or less, and it seems to me that until they are indorsed the charterparty is the governing document, the charterer and the shipowner are bound by its terms, and the bill of lading is a mere receipt.

Of course it makes a very great difference in the shipowner's position if the bill of lading has lesser exceptions in it than the charterparty, when it is indorsed, because then it imposes greater liabilities upon him. But why should that be so—why should that, as a matter of business, be allowed? And does not that consideration drive one to the conclusion that the proper view to take is that the charterparty is to be carried out by the master on the terms which are provided for, and that so far as the transit of the goods is concerned he is to sign bills of lading in accordance with the charterparty and in accordance with the exceptions which are therein contained?

I find nothing whatever in the charterparty to alter that view. I do not find any authority to the master to sign anything he pleases. There are certain stipulations as to clean bills of lading and as to the rate of freight which do not affect the question. But apart from that, it seems to me that the true reading is that he ought to sign such bills of lading as are in accordance with the charterparty so that the contract of carriage referred to in it may be in such terms as to leave the shipowner in the same position as he would have been in, no matter who is the owner of the cargo in question. The master appears to me, therefore, to have no authority as between himself and the charterer to sign the bill of lading in any other form, and it seems to me that in this case he had no authority to sign this bill of lading imposing a greater obligation upon the shipowner than the charterparty contemplated.

That that is so I gather from the only case to which I wish to refer on this point, namely, *Rodocanachi* v. *Milburn* (1), where Lord Esher said: "It seems to me that, in either of the views I have been expressing, the case is really covered by the authorities, which expressly hold that as between the charterers and the shipowners the bill of lading does not alter the contract between them contained in the charterparty. But, assuming that under this clause of the charterparty the master was to sign bills of lading in the form customary at the port of lading, and that the form of this bill of lading was such customary form, so that only a bill of lading in this form could be signed in accordance with the

(1) 18 Q. B. D. 67, 75.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

The President.

charterparty, then the result would be that the bill of lading to be signed under the charterparty would be one the stipulations of which were in part not the same as those of the charterparty. What in that case is the rule as to the construction of the two documents? In my opinion, even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods." Lord Lindley (1) says: "It seems to me that the charterparty must be the governing instrument. The meaning of the 10th clause of it is not altogether easy to ascertain." That 10th clause was this: "The master to sign bill of lading at any rate of freight, and as customary at port of lading, without prejudice to the stipulation of this charterparty, receiving the difference, if less than the rates specified therein, at port of loading, against his receipt for the same." Lord Lindley goes on: "It is difficult to say exactly what is meant by the words 'as customary at the port of lading.' I doubt whether they mean anything more than 'as usual.' I am clearly of opinion that they do not mean that the captain is to have authority to sign bills of lading containing stipulations contradicting the provisions of the charterparty." So far as those judgments go, they are in accordance with the view which I have been expressing, that the master had no authority to sign this bill of lading imposing upon his owner, when it got into the hands of third persons, greater liabilities than those which were contemplated by the charterparty, and that, that having been done, and the charterers being bound, in my opinion, to present bills of lading which carried out the charterparty, they have committed a breach of their contract, and they have done that which, although done under a mistake as to the law, without any improper intention, in fact cast a greater obligation upon the shipowner than he ought to have had cast upon him, and to my mind the damages flow as a matter of course from that position, having regard to the circumstances under which the loss occurred. That is dealing with the case upon the

(1) 18 Q. B. D. at p. 78.

assumption that there was a breach of contract because the master had no authority to sign these bills of lading, and that the charterers were parties to that breach of contract and must be taken to have known that the master had no authority to sign them.

But now let me turn to the other alternative. If the master had authority to sign the bill of lading in the form in which it was signed, it seems to me that that could only be derived from the powers conferred upon him by the charterparty, namely, to sign bills of lading in accordance with clause 7; and if he had authority, it means in effect that he was bound to sign such a bill of lading as this when it was presented to him. One does not need to go so far as to say that he would be bound to sign anything extraordinary, but if this was not unusual it might be said that he had authority to sign such a document, and that he derived that authority from clause 7. If he had authority it seems to me that, when the other terms of the charterparty are referred to on this assumption, the master having had authority and being bound to do that which he did for the benefit of and at the request of the charterers, the proper inference to draw from the charterparty itself and from the position in which the parties were placed at the time when the contract was being carried out under the charterparty is such as to impose upon the charterers the necessity of indemnifying the shipowner against that which they have asked the captain to do in these circumstances. That seems necessarily to follow, because otherwise the owner would be placed in this extraordinary position, that so long as the charterers held the bill of lading it was immaterial that it did not accord with the charterparty, but the moment they indorsed the bill of lading and conferred greater rights upon other people than they had themselves, he was to be called upon to pay for the goods, which he never intended to pay for if they had remained the property of the charterers unless he was not within the exceptions mentioned in the charterparty.

What, then, is it that the charterers in such a case would be asking the captain to do? They would be asking him (and I am assuming for this purpose that they would have a right to ask

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

The President.

him) to sign something which gave them an advantage, and placed the shipowner under a liability which he was not under to the charterers, and this it seems to me, having regard to the whole of the terms of the charterparty, necessarily leads to the inference that in that case there was to be an indemnity to the shipowner against the consequences.

If that is not so, the effect would be to render wholly nugatory the 6th clause of the charterparty, namely, the exception clause, because I do not suppose there is a single case in which the merchants at Rangoon would remain the owners of property until it got to its destination. In every case it would be sold, in every case there would be bills of lading, and in every case they would be indorsed over. What, then, is the value of those exceptions in the charterparty? If they are to be cut down by the bill of lading being dealt with in the way in which it was, it seems to me to follow as a matter of course that you cannot give any practical effect to the original exceptions in the charterparty, or to the words "without prejudice to the charterparty," if you allow the shipowner's position to be prejudiced, and if you in fact allow those exceptions to be cut down, without inferring that there is an indemnity to be given if the charterers take advantage of that position and use it so as to cast a greater liability upon the shipowner.

The only way in which it seems to me that Mr. Hamilton, whose able argument was of great assistance to the Court in this case, seeks to get out of that position is this. He rather leaves on one side the effect to be given to the charterparty, and says that when the bill of lading was presented by the charterers to the master, and both parties reasonably thought they were right in supposing that the bill of lading incorporated the exceptions as well as the other conditions of the charterparty, the master had authority to determine whether they did or did not. I think that that is putting upon the master a power and authority which he does not possess. It is no part of his business to determine in a charter case what the contract is which is contained in a bill of lading; his business is to carry out the charterparty. It is quite a different matter, of course, if the ship is put up as a general ship, and the master is left to settle

on what terms the goods are to be carried; that is a totally different question, and does not seem to me to be applicable to the particular case which is before us.

The other point which was made by Mr. Hamilton in connection with this part of the case is that where there is a bona fide mistake, such as was made by the master and the charterers in this case, no inference can be drawn from which a contract of indemnity can be gathered. But that, I think, again leaves out of consideration the charterparty to begin with. That might possibly be so, if there were no prior relationship between the parties, and I do not think it is necessary myself to pursue the view which was expressed by Phillimore J. in his judgment, and which is based upon the passage which has been quoted from Cotton L.J.'s judgment in the case of *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1) I feel certain difficulties about that branch of the case, although I am not prepared to say, as I am not deciding the case upon that point, that these difficulties might not be resolved in favour of the charterers.

I base my judgment on this broad ground, that there was a breach of contract on the part of the charterers which has resulted in the loss to the shipowner. On that ground I think that the decision of the Court below ought to be affirmed.

FARWELL L.J. I agree with the conclusion at which Phillimore J. has arrived, but not with the reasoning which he has given for that conclusion. To my mind the request which has been urged upon us has absolutely nothing whatever to do with the matter. The antecedent request which is necessary to form the consideration to support an action for work done or money paid has no relation to a request to perform an existing contract. The request adds nothing to the existing contract; the question of carrying it out or not carrying it out depends on the terms of the contract itself. Secondly, to my mind the representation as to the effect of that contract innocently made can give no rise whatever to any cause of action. The statement that the bill of lading contained the words "and all other conditions as per

(1) 34 Ch. D. 261, 272.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & Co.

Farwell L.J.

charterparty" was true. The real misrepresentation, if any, was as to the legal effect of those words. Both parties were equally ignorant of that legal effect. Therefore it seems to me to be impossible to say that any right of action arises as between two independent persons from the statement of one, if he made the statement, seeing that the belief was shared by both, that the construction of the words used in that document was one thing when in law it was another. But I agree with the conclusion at which the learned President has arrived on the ground which he has first put, namely, on the construction of this contract. One has to bear in mind the nature of the transaction between the parties. We have here the charterer and the shipowner in London contracting with reference to the carriage of rice from Rangoon to Rio. The bill of lading is one of those documents which are necessary for the assistance and benefit of the charterer. The parties provide therefore that, if the charterer desires it, he is to be armed with a document which primarily is a receipt to him, but which secondarily is for some purposes and to some extent a negotiable instrument enabling him to raise money. The parties accordingly contract in these words, "The master to sign clean bills of lading for his cargo," and so on, "without prejudice to this charter."

That to my mind imports one of two things. It may be a contract by the charterer to tender to the master such a bill of lading as shall not prejudice the charter (that is to say, shall be consistent with the terms of the charter), on which tender the master is bound by the contract of the shipowner to execute. That has been held in the case of *Oriental Steamship Co.* v. *Tylor*. (1) But possibly it might be said that the circumstances were somewhat different. There the freight was to be paid one-third on signing bills of lading; it was therefore, to some extent, to the advantage of the shipowner that the bills of lading should be signed. The bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before bills of lading were signed, the vessel sank and the cargo was lost. The charterer thereupon refused to present bills of lading for signature, and the shipowner

(1) [1893] 2 Q. B. 518.

sued him for breach, and it was held that the charterer was bound to present bills of lading for signature in order to enable the shipowner to recover his freight. Lord Bowen said (1): "It is plain that the bills of lading cannot be signed until they are properly made out and presented to the captain or agent in accordance with the charterparty. The first step must be taken by the charterers. It is inconceivable that the rights which are given to the shipowner on signing bills of lading can be delayed by the act of the charterers in not presenting bills of lading for signature. It is obvious that there must be an implied term in the charterparty, in order to make the contract effectual, that the charterers should present bills of lading to the captain or agent for signature within a reasonable time, so as to give effect to the rights of the shipowner. The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual." It may be said that in that case it was to the interest of both parties that bills of lading should be prepared, but that appears to me to be immaterial. On the other hand, it may be that this clause in the charterparty is to be read, not in the terms I have suggested of a positive contract by the charterer to tender such bills, but in what is perhaps the more natural way of reading it, as under this charterparty it appears to me to be solely for the benefit of the charterer as meaning that, on condition that the charterer do tender bills of lading properly made out in accordance with the charter, then the master, as attorney for the shipowner, shall execute them, bearing in mind that this execution is to be in all probability effected at the other side of the world. The President has already referred to the extent of the master's authority, and I need not refer again to that.

Now suppose the meaning is simply that, on condition the charterer do tender, the master shall execute, and the master has executed the document which was so tendered to him; it is well-settled law that a condition precedent of that nature alters its nature when the other party has performed his part of the

(1) [1893] 2 Q. B. at p. 527.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

Farwell L.J.

contract, and becomes then a separate and independent contract of itself. The apprenticeship cases, of which *Ellen* v. *Topp* (1) is an example, are illustrative of that. So that whichever way you read the contract—whether you read it as a positive contract by the charterer or as a condition that on the charterer doing something the master shall execute as attorney to my mind makes no difference—there is an express contract that upon a bill of lading being tendered for execution it shall be a proper bill of lading in conformity with and so as not to prejudice the actual charter.

That appears to me to apply whether the words are as they are in the present case, or whether they are, as in one of the cases cited, "as required by" or, as in another case, "as tendered by the charterer." In both those cases on construction it was held that the words "without prejudice to the charter" overrode the rest, and it appears to me to have been rightly so held. The whole case therefore to my mind amounts to this, that the master is simply the bare attorney of the shipowner for the purpose of executing a document which is to be prepared and tendered to him for the benefit of the charterer by the charterer.

Now in the present case the bill of lading tendered is entirely different from the charterparty, and the charterer has therefore committed a breach of contract in preparing and tendering and obtaining the execution of such a contract as that. I do not think it is material to say that the master may, if he likes, look at the document and say, "This is not within my authority." Supposing it was not a bill of lading at all, he is not bound to execute it; supposing it was a bill of lading which he saw at first sight declared that it was to omit all the terms of the charter, it would still be open to him to say, "I am not attorney to execute such a document as that." That is a totally different proposition from treating the master as the agent of the shipowner for the purpose of negotiating and settling the terms of the bill of lading. I do not think that the case of *Sheffield Corporation* v. *Barclay* (2) has any reference to this case. If the master is to be treated as having plenary authority, and is to be treated as a principal contracting there with the charterer as to the terms of

(1) (1851) 6 Ex. 424. (2) [1905] A. C. 392.

the bill of lading, it appears to me that no rights would arise from any such representation as to the legal effect of the words as is here suggested.

In *Sheffield Corporation* v. *Barclay* (1) the bank tendered for registration a deed which they represented to be a good deed. It was, in fact, a forgery, and they asked the company, which had the merely ministerial duty of registering, to register on their statement. There was a statement of fact there on which the company was invited to act, and on which it did act to its detriment, acting at the request and for the benefit of the person who produced the deed. But here there is nothing analogous to that. If you treat these two persons as parties contracting at arm's length for the purpose of settling what the terms of the document were to be, the case I put to learned counsel during the course of the argument seems to me to be unanswerable. Two laymen agree for the conveyance of a house, and they choose to prepare a deed for themselves; one of them has seen the words "beneficial owner" in legal documents and has used them in the draft. The vendor happens to be a trustee, and he tells the purchaser, "Yes, it is all right; those are the usual words." And those words are put in. The purchaser afterwards sells to another purchaser for value who gets the legal estate without notice of the mistake. There is no possibility of rectifying as against him, and nobody would contend that there was any liability for misrepresentation or any right arising upon request or anything of that sort, because both parties honestly and bona fide misunderstood the legal effect of the words they were using. It appears to me that if these parties are to be treated as ordinary persons dealing at arm's length, *Barclay's Case* (1) would have no application and the action would fail, but in my opinion it succeeds on the point which I have put upon the construction of the contract.

BUCKLEY L.J. I also am of opinion that this appeal fails. As between the charterer and the shipowner, the contract as contained in the charter was that the latter was not liable to the

(1) [1905] A. C. 392.

C. A. 1907

MOEL TRYVAN SHIP COMPANY v. KRUGER & CO.

Buckley L.J.

former for loss occasioned by negligence. Bills of lading, however, were given in such a form as that, between the holder of the bill of lading and the shipowner, the latter was liable to the former for loss occasioned by negligence. The holder of the bill of lading sued the shipowner and recovered against him. If bills of lading had not been given and indorsed the shipowner would not have been liable. In this action he sues the charterer for damages or for indemnity in that state of facts. His case is that the liability to which he has been exposed is one in respect of which he expressly contracted with the charterer that he should not be liable, but in respect of which he has nevertheless by the act of the charterer been rendered liable. The charterer contends that this charter involves that result. As matter of business I have difficulty in understanding how it can be supposed that a shipowner would ever have entered into such a charter. I cannot express it, I think, better than in the terse words which Mr. Scrutton used: "Is it likely that a shipowner would enter into a contract the result of which would be that so long as the cargo belonged to the charterer he should not, but when the cargo came to belong to a third party he should, be liable for negligence?"

The shipowner's liability, it will be noted, arose by reason of two things, first, that the bills of lading did not except negligence, and secondly, that the bills of lading were indorsed. The existence of either one of these without the other would have left the shipowner free from liability. The liability therefore arises, amongst other things, from an act over which the shipowner, of course, had no control, the charterer having obtained the bills of lading and indorsed them to a third party.

I propose to deal with the case upon the two alternatives, first that the master had, and secondly that the master had not, authority to give bills of lading in the form in which they were given. If he had authority to give bills of lading in that form his act bound the shipowner, and upon this hypothesis was an act authorized within the charterparty. But the charterparty provided by article 7 that the master signing clean bills of lading, &c., should do so without prejudice to this charter. As to the meaning of those words I refer to what Pollock C.B. said in

Shand v. *Sanderson* (1), to what Lord Esher said in *Rodoconachi* v. *Milburn* (2), and to what Lord Esher again said in *Hansen* v. *Harrold Bros.* (3), the outcome of which is, reading the words in the last-mentioned case, that "it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." And further down he says that the captain was bound to sign the bill of lading presented to him, "but when he has done so it does not affect the contract contained in the charterparty."

Upon this alternative, therefore, the master ex hypothesi has by authority signed bills of lading exposing the shipowner to a liability to the holder of the bill of lading, the terms being that the stipulations of the contract, as between the shipowner and the charterer, that the shipowner shall not be liable shall remain and prevail. It seems to me to follow from that that by contract the charterer is liable to indemnify the shipowner because, as between those parties, it has been agreed that the shipowner shall not be subject to a liability to which by an act which I am assuming now he does of his own free will he becomes exposed.

Then take the second alternative, that the master had not authority to sign the bills of lading in the form in which they were signed. Then the position is this: The charterer goes to the master and says, "Give me an instrument by which, if I indorse it, I shall create against your principal a right of action in a third party to which as between your principal and myself, he is not to be exposed"; and the master does so. In signing the bill of lading the master must be acting on behalf of the shipowner, that is to say, for this purpose he is the alter ego of the shipowner. The shipowner therefore, it appears to me, is as against the charterer entitled to say, "For the purposes of the liability as between us the request was made to me, the shipowner." If that be so, then I think that the principle stated by Cotton L.J. in the case of *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (4),

(1) (1859) 4 H. & N. 381, 389.
(2) 18 Q. B. D. 67, 75.
(3) [1894] 1 Q. B. 612, 619.
(4) 34 Ch. D. 261, 272.

C. A. 1907

MOEL TRYVAN SHIP COMPANY. v. KRUGER & CO.

Buckley L.J.

and by Lord Halsbury in *Sheffield Corporation* v. *Barclay* (1) in approving the argument of Mr. Cave in *Dugdale* v. *Lovering* (2), applies—that is to say, that A. has made to B. a request to do a thing for him, and B., in consequence of his doing this act, is subject to a liability or loss, from which the law implies a contract by A. to indemnify B. Speaking for myself, I prefer to rest my judgment upon this ground rather than upon the ground of the decision in *Sheffield Corporation* v. *Barclay*. (1) It seems to me that it was not a ministerial act. If it was an act done under the contract it was done, not ministerially, but in performance of the contract. On the other hand, if it was not under the contract, then it was something which the master owed nobody a duty to do ministerially or otherwise.

An argument has been pressed upon us that we ought to regard it as material whether the master and the charterer at the moment when the bills of lading were signed were or were not under the common belief that the bills of lading were proper in point of form. It appears to me that that is immaterial. In the two passages which I have cited I do not find anything stated to the effect that when A. requests B. to do the act he must have a belief that there will be something to be indemnified against. The right in law seems to me to follow from this, that he requests him to do an act, and then the law implies that if liability results from the act there will be an indemnity given by the one party to the other.

The other way of arriving at the same result is that which has been elaborated by the members of the Court who have preceded me, and it is this, that article 7 of the charterparty extended only to such bills of lading as should be consistent with the charterparty. The authority of the master of course is not given by the charter; it is not an instrument to which the master is a party. The limitations and scope of the master's authority are governed by the charter in this sense, that he is there on behalf of his principal to give effect to the contents of the charter, and that he ought to act according to the charter. Then article 7 extends only to such bills of lading as are consistent with the charterparty. The charterer ought to have tendered to the master

(1) [1905] A. C. 392, 397. (2) L. R. 10 C. P. 196.

for signature bills of lading such as would be consistent with the charterparty. If he tendered to him other bills of lading not consistent with the charterparty, then the charterer committed a breach of contract in so doing. The result is liability in damages, and the measure of damage is the loss which the shipowner suffered by reason of his being induced to create such a right in the bill of lading holder as has been enforced against him.

There remains only one other point, and that is this. It has been argued that the master at the port of loading was the agent of the shipowner for the purpose of determining whether the bill of lading was right in form or not; it seems to me to be unnecessary to decide that. Assuming that he was, then that only brings us back to the case with which I dealt first, of the bill of lading being signed by the master with authority to sign it.

For these reasons I think that the decision of the Court below was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Hollams, Sons, Coward & Hawksley; Holman, Birdwood & Co.*

H. B. H.

K. B. D
1905
Nov. 16, 17;
Dec. 4.
C. A.
1907
Feb. 1.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

HUTTON *v.* RAS STEAM SHIPPING COMPANY, LIMITED.

Ship — Seaman — Contract of Service — Contraband of War — Refusal to Proceed—Offence against Discipline—Order of Naval Court—Discharge of Seaman—Action for Wages—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 225, *sub-s.* 1 (*c*); *s.* 483.

A naval Court summoned under the provisions of the Merchant Shipping Act, 1894, in dealing with the offence of continued wilful disobedience by a seaman to lawful commands, may put in exercise all its statutory powers so far as they are applicable to the case, including the power to discharge the seaman from his ship, and is not limited to the powers of punishment conferred by the Act on a Court of summary jurisdiction in respect of the same offence.

An order regularly made by a duly constituted naval Court within the scope of its jurisdiction is conclusive in any subsequent legal proceedings of the rights of all the parties interested, whether they are parties to the proceedings before the naval Court or not; consequently, where by such order a seaman is discharged from his ship, the order is a bar to a civil action by the seaman against the owner for wrongful dismissal, notwithstanding that the owner was not a party to the criminal proceedings.

The plaintiff, who was engaged on a ship for a term of three years, which covered the period of the Russo-Japanese war, on the arrival of the ship at Yokohama, refused to continue the voyage on the ground that the ship was carrying contraband of war. At the instance of the master a naval Court was convened, which found the plaintiff, with others of the crew, guilty of continued wilful disobedience to lawful commands and of insubordination prejudicial to the owners' interests, and rejected the men's plea with respect to the carriage of contraband; and the Court discharged the men from the ship and forfeited their wages. In an action by the plaintiff against the owner for wrongful dismissal and for wages, it appeared that the ship was carrying contraband at the time of the plaintiff's refusal to proceed: —

Held (affirming the decision of the Lord Chief Justice), that the order of the naval Court was a bar to the action.

THIS was an action by a seaman for wages alleged to be due to him as donkey-man on the steamship *Ras Bera*, and for damages for breach of contract for service.

The defence was that the plaintiff was discharged by an order of a naval Court held at Yokohama, on April 16, 1904, under

1905

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

the provisions of the Merchant Shipping Act, 1894, and that that decision was a bar to the action.

The action was tried before the Lord Chief Justice, the jury having been discharged by agreement. The facts as stated by the Lord Chief Justice in his judgment were as follows:—

The plaintiff shipped at Barry, under articles for a voyage for three years for Port Arthur via Barry $\frac{\text{and}}{\text{or}}$ any ports within certain limits, which included Japan, and back to a final port of discharge in the United Kingdom. The vessel loaded a cargo of coals at Barry and arrived at Port Arthur on January 18, 1904, during the siege, and the coals were there discharged. The vessel left Port Arthur on February 11, and went in ballast to Moji, a port on the west coast of Japan, whence she proceeded to Hong Kong. At Hong Kong the *Ras Bera* was chartered by the Nippon Yusen Kaisha, the Royal Mail Steamship Company of Japan, on a voyage to carry cargo and passengers to all parts of the world except British North America and Magellan, including Japanese ports. The charter provided that the steamer should fly at the mainmast head during her stay in port any private signal or home flag of the charterers. It was also provided by clause 26 of the charterparty that the charterers should not employ the steamer in the carrying of troops and contraband of war. Under this charter she was to proceed to Moji and from Moji to Yokohama. It was alleged by the plaintiff that the steamer carried on these two voyages, among other things, rails and other railway material. By Russian proclamations published in the *London Gazette* of March 1 and 22 materials for the construction of railways were declared by Russia to be contraband of war. Upon the arrival of the vessel at Yokohama the plaintiff and others of the crew objected to continuing the voyage on the ground that the vessel was carrying contraband of war, and declined to work until some arrangement was made that in the event of capture they would be indemnified and their wives and families compensated and cared for. While the question was under discussion the plaintiff and the others who objected declined to do any work, but except in respect of such refusal it was not alleged that they refused to discharge their duty.

1905

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

On the complaint of the master that certain of the seamen on board the *Ras Bera* were guilty of continued wilful disobedience to lawful commands and continued wilful neglect of duty, and of general insubordination subversive of discipline on board the said *Ras Bera* and prejudicial to the owners' interests, a naval Court was convened by the acting British consul at Yokohama under the provisions of the Merchant Shipping Act, 1894, and the seamen were summoned to appear before the Court on April 16.

The summons recited the nature of the complaint in the terms above stated, and it then proceeded: "And whereas the offence of which you are accused as aforesaid is that of continued wilful disobedience to lawful commands and continued wilful neglect of duty, an offence against s. 225 of the Merchant Shipping Act, 1894, which is punishable on summary conviction."

The naval Court made an order whereby the Court, having heard and carefully considered the evidence given before it in the presence of the accused, and having carefully considered their statements in defence, found that each of the accused, on April 12 and subsequent days up to date, "was guilty of continued wilful disobedience to lawful commands of the officers of the ship and continued wilful neglect of duty without good and sufficient cause, which is an offence against the Merchant Shipping Act, 1894, punishable on summary conviction, and of insubordination subversive of discipline on board the ss. *Ras Bera* and prejudicial to the owners' interests." The order then proceeded: "Their plea that the carriage of contraband vitiates the agreement is without force. The voyage remains an ordinary commercial venture, any risk or responsibility that may be incurred is borne by the ship." The Court then ordered that the men should be discharged as from the date of the order, and that the balance of wages determined by the court to be respectively due to the several men should be forfeited to the ship. The amount of wages forfeited in the case of the plaintiff was 6*l.* 19*s.* 11*d.*, or thirty-eight days' pay.

Evidence was given before the Lord Chief Justice by the plaintiff that at Yokohama the vessel was both taking in and discharging railway materials, and his Lordship was of opinion

upon the evidence that this was the case. Upon the other hand, evidence was also given by the plaintiff that military stores were being shipped and men in uniforms carried as passengers; but upon the evidence his Lordship did not find either that the vessel was fitted for carrying troops or members of the Japanese navy, or that any were so carried.

The question turned upon the construction of ss. 225, 480 and 483 of the Merchant Shipping Act, 1894. (1)

(1) Sect. 225: "(1.) If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in the Act referred to as offences against discipline, he shall be liable to be punished summarily as follows; (that is to say,) . . . . (*c*) If he is guilty of continued wilful disobedience to lawful commands or continued wilful neglect of duty, he shall be liable to imprisonment for a period not exceeding twelve weeks, and also, at the discretion of the court, to forfeit for every twenty-four hours' continuance of disobedience or neglect, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute."

Sect. 480: "A court (in this Act called a naval court) may be summoned by any officer in command of any of Her Majesty's ships on any foreign station, or, in the absence of such an officer, by any consular officer, in the following cases; (that is to say,) (i.) Whenever a complaint which appears to that officer to require immediate investigation is made to him by the master of any British ship, or by a certificated mate, or by any one or more of the seamen belonging to any such ship; (ii.) Whenever the interest of the owner of any British ship or of the cargo thereof appears to that officer to require it."

Sect. 483: "(1.) Every naval court may, after hearing and investigating the case, exercise the following powers; (that is to say,) . . . . (*c*) the court may discharge a seaman from his ship: (*d*) the court may order the wages of a seaman so discharged or any part of those wages to be forfeited, and may direct the same either to be retained by way of compensation to the owner, or to be paid into the Exchequer, in the same manner as fines under this Act: . . . . (*f*) the court may direct that all or any of the costs incurred by the master or owner of any ship in procuring the imprisonment of any seaman or apprentice in a foreign port, or in his maintenance whilst so imprisoned, shall be paid out of and deducted from the wages of that seaman or apprentice, whether then or subsequently earned: . . . . (*h*) the court may punish any master of a ship or any of the crew of a ship respecting whose conduct a complaint is brought before them for any offence against this Act, which, when committed by the said master or member of the crew, is punishable on summary conviction, and shall for that purpose have the same powers as a court of summary jurisdiction would have if the case were tried in the United Kingdom: . . . .

"(2.) "All orders duly made by

1905

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

Robson, K.C., B. R. Wise, and *M. Morgan*, for the plaintiff.
Batten, K.C., and *Bailhache*, for the defendants.

Cur. adv. vult.

1905. Dec. 4. LORD ALVERSTONE C.J., after stating the facts substantially as above set out, continued as follows :—The main question in the case is whether, having regard to the provisions of s. 483 of the Merchant Shipping Act, the plaintiff is entitled to maintain his action. It was contended on behalf of the defendants that they had not discharged the seamen, that their discharge from the ship was the act of the Court, and that therefore no question of wages subsequent to the date of discharge could possibly arise. It was contended on behalf of the plaintiff that the order of the naval Court was bad and not binding on the plaintiff, and that, inasmuch as he had been only discharged from the ship thereunder, his wages continued to run under the provisions of the Merchant Shipping Act. The plaintiff's main ground of contention was that the order of the naval Court was made without jurisdiction, and that, inasmuch as the offence with which the men were charged was an offence against s. 225, having regard to the provisions of that section, the Court had no power to discharge the plaintiff from his ship. It was further contended that the passage in the order rejecting the seamen's plea that the carriage of contraband vitiated the agreement shewed that the order was contrary to natural justice, and therefore was incapable of being enforced.

In order properly to appreciate these arguments it is in my opinion necessary to consider in the first place what is the position of the Court held under ss. 480—486 of the Merchant Shipping Act, and on what grounds, if any, the decision of such a Court can be impeached. It is in my opinion a British Court sitting by virtue of the authority of a British statute and administering British law. It summons the parties before it, and has

---

a naval court under the powers hereby given to it, shall in any subsequent legal proceedings be conclusive as to the rights of the parties."

jurisdiction to investigate any charges made under the sections of the Act which can be entertained by Courts having summary jurisdiction. That is clearly provided by s. 483, sub-s. 1 (*h*). But the powers of the Court, so far as punishment is concerned, are not confined to the powers contained in s. 225, because express power is given by clause (*c*) of sub-s. 1 of s. 483 to discharge seamen from the ship and by clause (*d*) to forfeit wages. These powers are in excess of those given by s. 225. Sub-s. 2 of s. 483 provides that all orders duly made by a naval Court under the powers of that section shall in subsequent legal proceedings be conclusive of the rights of the parties. In my judgment this provision was required in order to give orders of the naval Court the effect of judgments inter partes. The Court was a new Court created by statute, and but for this sub-section some question might have arisen as to whether its decisions were final and conclusive as those of a Court of record. Unless, therefore, the plaintiff could have successfully maintained that the order of the Court was made without jurisdiction, it was an answer to the plaintiff's claim. It was contended on behalf of the plaintiff that the word "duly" in sub-s. 2 of s. 483 implied that the order was correctly made in point of law, and that the statement in the order in question with reference to the plea of contraband shewed that the order was not duly made. I cannot accede to that argument. At the outside it seems to me that the sub-section enacts that the proceedings must be regular—that is to say, that the parties must be summoned on some definite charge, the parties and witnesses heard, and the case determined. I have, however, looked through the evidence which was before the Court, and I am not satisfied that the passage which has been so much criticized bears the construction which the plaintiff has put upon it. Whatever may have been the true facts, there was no substantial evidence before the Court that the vessel was carrying contraband of war, and it is quite consistent with that passage that the Court rejected the plea upon the ground that they were not satisfied with the allegations of the seamen on that point.

In the view which I take it is unnecessary to consider what the rights of the plaintiff would have been if the question for

1905

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

decision were the effect upon the contract of service of the carrying of contraband of war. I think that the claim for wages fails, and that the action must be dismissed with costs.

The plaintiff appealed. The appeal was heard on February 1, 1907.

Danckwerts, K.C., and *Llewelyn Williams*, for the plaintiff. The question is whether the plaintiff and the other seamen were justified in refusing to proceed with the voyage without special terms to a belligerent port with contraband. It is submitted that no offence was committed under the Merchant Shipping Act, 1894, and that if an offence was committed the jurisdiction of the naval Court in dealing with it was the same as a Court of summary jurisdiction in this country: see s. 483, sub-s. 1 (*h*). The only offence charged against the men was that referred to in s. 225, sub-s. 1 (*c*), and the punishment for that offence is forfeiture of a sum not exceeding six days' pay for every twenty-four hours' continuance of disobedience and imprisonment. The naval Court therefore exceeded its jurisdiction in discharging the plaintiff and forfeiting his wages beyond the limit mentioned in that section. Having regard to the terms of clause (*h*) in s. 483, sub-s. 1, it was not competent to the naval Court to exercise the powers conferred by the other clauses of the sub-section in respect of this offence. Further, this order is not "duly" made within s. 483, sub-s. 2. The passage in the order rejecting the seamen's plea on the ground that the venture remained an ordinary commercial venture shews that the order is bad on the face of it. The men knew that there was contraband on board, and were right in refusing to go on because the character of the venture had been changed. Lastly, assuming the order to have been duly made, it was not a bar to the proceedings by virtue of sub-s. 2, because the owners were not parties to the criminal proceedings. Apart from the order of the naval Court, the case is covered by *Sibery* v. *Connelly* (1) and *Caine* v. *Palace Shipping Co., Ld.* (2)

Batten, K.C., and *Bailhache*, for the defendants. There is no

(1) (1905) 22 Times L. R. 174. (2) Ante, p. 670.

cause of action, because the discharge was not by the master, but by the naval Court.

[They were stopped.]

SIR GORELL BARNES, PRESIDENT (after stating the facts). The main question in this case is not the same as that raised in *Sibery* v. *Connelly* (1) and *Caine* v. *Palace Shipping Co.* (2), but is what is the effect of the decision of the naval Court at Yokohama. That must turn, I think, on the procedure adopted and on the powers which the Court had. Sects. 480 to 486 of the Merchant Shipping Act, 1894, are the sections which deal with the constitution of the naval Court which determined this matter. As I understand, the main point made by Mr. Danckwerts on behalf of the appellant is that the summons was issued for an offence within s. 225, sub-s. 1 (*c*), and for that only, and that the naval Court had no power except to inflict the punishment contemplated by that clause, and consequently had no power to discharge the man from the ship and put an end to the service upon which he was engaged. It is to be observed that s. 225 deals with the case of summary conviction, and with those matters which can be brought before the magistrate or Court referred to in s. 711 of the Act where the offence is committed in any British possession, or, when it is committed in the United Kingdom, before a magistrate having the ordinary powers of a Court of summary jurisdiction. The Court in the present case is constituted under s. 480, and it is therefore necessary to see what powers that Court had under the statute. [His Lordship referred to ss. 480, 481, 482, and s. 483, sub-ss. 1 (*c*) (*d*) (*f*) (*h*) and 2.]

The question is whether it was competent for the Court in this case to exercise all the powers conferred by the various clauses of sub-s. 1 of s. 483 so far as they were applicable, or whether the power of the Court was confined to punishing this man in the manner contemplated by clause (*h*). There appears to be the strongest ground for holding that the Court, even where the matter brought before it is a complaint under s. 225, sub-s. 1 (*c*), could, on having the offence proved before

(1) 22 Times L. R. 174. (2) Ante, p. 670.

C. A. 1907

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

The President.

it, deal with the case in such a way as to apply all the powers in sub-s. 1 of s. 483 so far as they were applicable to the case. It must be remembered that these matters, speaking generally, are being dealt with in a foreign port or on the high seas. The heading to this group of sections is "Naval Courts on the High Seas and Abroad." The Legislature is dealing with cases where it may be that something more is required than simply to punish the men or fine them or forfeit their wages. Other steps may be necessary to be taken in order to free the ship and get rid of the difficulties which the complaint has given rise to. Therefore it seems to me reasonable to look for a clause, such as we find in s. 483, sub-s. 1, giving more power than that of merely punishing; and, further, that view is fortified by the way in which these sections are arranged and expressed. Sect. 480 starts, "Whenever a complaint is made"; then s. 482 says, "A naval Court shall hear the complaint"; s. 483 authorizes the Court, after hearing and investigating the case, to exercise any of the powers therein mentioned. Why should the exercise of those powers in this case be limited to the particular matter which is referred to in clause (*h*)? I cannot myself find anything in the wording of these sections to impose such a limit upon the powers of the Court. Then it is said that it would not be fair to the men to punish them to any greater extent than is contemplated by s. 225, sub-s. 1 (*c*), because they do not have adequate notice of the charge which is being made against them. I do not think there is any substance in that point, even if the summons were expressly confined to an offence under s. 225, sub-s. 1 (*c*). The men know perfectly well what is the offence, and the Court has to hear the men, and would see that no injustice was done, because the matter would be thoroughly investigated, and the men would only be dealt with in such a way as the naval Court had power to deal with them, either by discharging them from the ship or otherwise, in addition to any penalty. Moreover, this point has no merits in this particular case, because the summons shews that it was not in terms confined to the particular offence mentioned in s. 225, sub-s. 1 (*c*), but related also to insubordination subversive of discipline

and prejudicial to the interests of the owners. So that there was a general application which might be dealt with if the Court thought fit under the general powers conferred by s. 483, sub-s. 1.

The only other point is, What is the effect of sub-s. 2 of s. 483? It is said that that cannot bind the present parties, but upon consideration it seems to me that it really must have that effect, because between whom are the subsequent legal proceedings there referred to? They can only be between the owners on the one side and the seamen on the other, or it may be between the master and his owners or between the master and the seamen. Is it not right to read that sub-section, if one is satisfied that the order was duly made (which I think I have already shewn to be the case), as meaning that the order should in subsequent legal proceedings be conclusive as to the rights of the parties interested? The wording is curious; it is not "conclusive between the parties to the particular proceeding," but "conclusive as to the rights of the parties." At any rate, the seamen were parties to these proceedings, and in my opinion the sub-section, when fairly considered, means that, if once the matter is disposed of by the naval Court, so long as it has power to dispose of it, that puts an end to the matter, irrespective of who is concerned in the subsequent legal proceedings, whether it be the master, owners, or seamen. If that is the right view, then the order of the naval Court in this case put an end to the matter; it was that which discharged the seamen, and not any act of the owners themselves, because the Court had jurisdiction to do what it did, and it exercised its jurisdiction. It seems to me—whether the conclusion of the Court was right or wrong in law does not matter—that the proceedings were binding upon the men by virtue of the sub-section to which I have referred, and therefore that the action cannot be maintained. I understand that to be the view expressed by the Lord Chief Justice, and with that view I agree. Therefore, in my opinion, the appeal fails.

FARWELL L.J. I agree. This fasciculus of clauses as to the holding of naval Courts creates a special tribunal specially constituted of not less than three persons for the purpose of dealing with emergencies arising in foreign ports or on the high seas.

C. A. 1907

HUTTON v. RAS STEAM SHIPPING COMPANY, LIMITED.

Farwell L.J.

This particular Court has functions and powers given to it by the sections which the President has read, and which I will not go through again. Put shortly, my view is this: Sect. 483 specifies a number of powers which the Court may exercise, including the powers of forfeiting wages and imprisonment, which are given to a Court of summary jurisdiction under s. 225, sub-s. 1 (*c*), and I cannot see that by specifying the particular powers of punishment given to a Court of summary jurisdiction it shews any intention of excluding this special Court from the general powers given seriatim in a number of clauses.

With regard to the question whether the decision of the Court is conclusive under sub-s. 2, it is well settled that the estoppel in law is only between the parties, and my own view is that this was intended to exclude any question as to the extent of the estoppel and to shew that the parties interested were intended to have their interests bound by the decision of this Court, which would not be the case if the matter rested simply on the common law doctrine of estoppel, because the proceedings would be between the King and the prisoner. That owners are intended to be included in the word "parties" I think is plain from the consideration of s. 483, sub-s. 1 (*d*), where the Court may direct the wages to be retained by way of compensation to the owner, so that in that case there would be an adjudication in favour of or against the owner, as the case might be. I think it is plain that that does intend to make the decision of the Court binding in subsequent proceedings against the owner.

The only other point is as to the meaning of the word "duly." If "duly" means "rightly" it would make the sub-section altogether nugatory. To my mind it can only mean "properly made on a case properly brought before the Court for its consideration." I think that the appeal fails and must be dismissed.

BUCKLEY L.J. For the decision of this case it is necessary to see what was the complaint, what was done upon that complaint, what jurisdiction purported to be exercised, and whether that jurisdiction was exercised rightly. If it was, then, having regard to s. 483, sub-s. 2, the order is conclusive as to the rights of the parties. The complaint I take from the master's letter,

which is annexed to the report of the proceedings before the naval Court. It is quite plain what the complaint was, namely, that certain seamen were guilty of continued wilful disobedience to lawful commands and continued wilful neglect of duty and of general insubordination on board the *Ras Bera* prejudicial to the owners' interests. The first two subject-matters there mentioned are within s. 225, sub-s. 1 (*c*); the third is not. Upon that complaint the proper authority convened a naval Court to investigate the complaint made by the master, stating the nature of the complaint in identically the same words. The summons properly recites the complaint, but goes on in a way which is not precisely accurate. If it had run "and whereas the offence of which you are accused as aforesaid *includes* that of" so-and-so, it would have been perfectly correct; but unfortunately it does not say that, but says "*is* that of" so-and-so, "an offence against s. 225 of the Merchant Shipping Act, 1894, which is punishable on summary conviction." In my opinion the whole matter is governed by the preamble, which recites the complaint fully, and when I come to the proceedings before the naval Court there is no question as to what they found. [His Lordship read the findings set out in the statement.] So that they accepted and adjudicated upon the whole subject-matter. That being the complaint and the finding, what were the powers of the naval Court? They seem to me to be all those which are given by s. 483, sub-s. 1 (*c*) (*d*) and (*h*). Clause (*h*) was that which a Court of summary jurisdiction could have done under s. 225. It seems to me that clauses (*c*) and (*d*) are cumulative upon (*h*), and that this naval Court, which was sitting at a place abroad, was constituted the authority to settle and determine matters other than those included in s. 225. It appears to me, therefore, that they were acting within their jurisdiction; and if they acted within their jurisdiction, s. 483, sub-s. 2, makes their order conclusive as to the rights of the parties. As to the order being binding between the shipowners and the seamen, I have nothing to add to what the President has said. The appeal fails.

Appeal dismissed.

Solicitors: *John T. Lewis; Holman, Birdwood & Co.*

H. B. H.

C. A.
1907
Feb. 27.

[IN THE COURT OF APPEAL.]

DARLING *v.* RAEBURN.

Ship—Charterparty—Charter of Ship for Voyage—Implied Condition that Shipowner will not use Ship in manner prejudicial to Charterer—Carriage of Bunker Coal intended for use on future Voyage.

The plaintiffs chartered the defendants' ship to load "a full and complete cargo . . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceed therewith to two or three ports of discharge. On arrival of the ship at her first port of discharge the defendants took on board a large quantity of bunker coal intended for use, not upon the existing voyage, but upon some prospective voyage to be commenced after her final discharge. In consequence of the loading of the coal, the ship, on arriving at her next port of discharge, had to be lightened before she could get over the bar, whereby the plaintiffs were put to considerable expense. But for the loading of the coal she would have been able to enter the port without lightening:—

Held (affirming the decision of Kennedy J., [1906] 1 K. B. 572), that under such a charterparty the shipowner is not entitled to load, to the disadvantage of the charterer, more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage and for the due performance of that voyage; that there is an implied term in the contract that the ship shall, except as aforesaid, be used only for the purposes of the charterers; and that the defendants had consequently committed a breach of their contract and were bound to recoup the plaintiffs the expense to which they had been put.

Appeal from the decision of Kennedy J. (1)

By a charterparty dated December 27, 1904, the plaintiffs chartered the defendants' ship *Balmoral* to load at Australian ports "a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ flour . . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and, being so loaded, to proceed thence "to two or three ports in South Africa between Delagoa Bay and Cape Town, both inclusive . . . . or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter at all times of high water such port" and there deliver the same. The *Balmoral* loaded a full cargo at various Australian

(1) [1906] 1 K. B. 572.

ports and sailed for Durban, East London, and Algoa Bay. On arrival at Durban she discharged cargo to the weight of 662 tons, partly for the purpose of lessening her draught and enabling her to get over the bar at East London, which was her next port of discharge. After discharging the 662 tons she drew only 21 ft. 1 in., at which draught she could easily have entered the port of East London. The master, however, took on board at Durban 800 tons of bunker coal, which had the effect of increasing her draught by two feet. This coal was not intended for use upon the chartered voyage, but was taken on board in expectation that the ship on arrival at Cape Town would go on her next voyage to the River Plate, and in view of the fact that the price of coal was much higher at Cape Town than at Durban. When the *Balmoral* arrived at East London it was found that she could not cross the bar, and she had to discharge 727 tons into lighters before she could get to the wharf. The cost of this lighterage, 181*l.* 15*s.*, was paid by the charterers under protest; and the action was brought to recover it back from the defendants.

Kennedy J. gave judgment for the plaintiffs. The defendants appealed.

J. A. Hamilton, K.C., and *Raeburn*, for the appellants. Under a charterparty of this kind the shipowner reserves to himself the bunker space of the vessel. So long as he fulfils the obligation of carrying the cargo his rights in that respect are not to be cut down. There is no authority for the implication in the contract of a term that the shipowner is never to be entitled to carry more coal in the bunkers than is necessary to complete the voyage. The charterer has not specified what use is to be made of the space reserved to the shipowner. There are express clauses by means of which the owner's rights to use his bunkers may be cut down. In the absence of any such provision there is no restriction upon the shipowner's right to load as much bunker coal as he pleases, whether for the chartered voyage or any other: *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1)

(1) (1897) 2 Com. Cas. 173; reversed, on appeal on another point, 2 Com. Cas. 286.

C. A. 1907

DARLING v. RAEBURN.

Scrutton, K.C., and *Roche*, for the respondents. The charterers intentionally discharged at Durban sufficient cargo to allow the ship to enter at East London. The shipowner then loaded this extra coal, and so increased her draught that she could not enter that port without again lightening. There is an implied term in the contract that the shipowner shall not to the disadvantage of the charterer load more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage.

[LORD ALVERSTONE C.J. Are you not seeking to import a warranty that the ship shall not draw more than a certain amount of water?]

No; the warranty that is implied is pointed out by A. L. Smith L.J. in *The Vortigern*. (1)

[They were stopped by the Court.]

Hamilton, K.C., in reply.

LORD ALVERSTONE C.J. I confess, speaking for myself, that if I had been the judge of first instance in this case I think I should have found quite as much difficulty as Kennedy J. did. It seems to me by no means an easy case. It is clear that if the terms of a contract contemplate a particular thing, and apparently control the incidents, duties and obligations relating thereto, other obligations or further rights cannot be rightly implied. But, having had the great advantage of reading Kennedy J.'s judgment, and hearing all the comments made upon it in argument, I certainly am not able to displace the arguments on which that judgment is founded. I will very shortly state the reasons which bring me to the conclusion that the judgment is right. It seems to me that there must be some limit put upon the rights of a shipowner in such a case unless it can be established that he is entitled to fill his bunkers whenever and wherever he pleases on the voyage so long as he keeps his ship seaworthy. If there had been authority for the proposition that a shipowner has the use of the bunkers for trade purposes, subject only to the condition that he shall not hamper the charterer in the use of the holds, or shall not diminish or impair the seaworthiness of the ship, then I could

(1) [1899] P. 140, at p. 152.

have understood the appellants' contention; but the result of the argument has been to bring out, to my mind at any rate, that the case cannot be put so high as that. Just let me state the circumstances. We are told that at West Australia, the bunker capacity of this ship being 1100 odd tons, she had 800 tons of coal on board. If the appellants are right in contending that this may be regarded from what I call the shipowner's point of view only, I see no reason why the shipowner at Durban should not have said, "These are my bunkers, I will load them right up, I am going to use my ship afterwards; the coal is cheap at this place, and I will load all I can." Therefore it seems to me that it may be said against the appellants' contention, "You must not use your ship, as regards the bunkers, as a cargo-carrying ship for the purpose of the owner's interest, if thereby you increase the burden upon the charterer." And that is the view which my brother Kennedy has expressed in better terms. He says: "It is admitted that if no more coal had been taken than was sufficient for the particular voyage, allowing a fair margin for contingencies, no lightening would have been necessary." Then he says: "I cannot think that that view "—that is, Mr. Hamilton's view—" is in accordance with the provision that the charterer is to load a full and complete cargo 'not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture.' I think those latter words indicate the limit of what the shipowner is to load on his own account." I understand my brother Kennedy to have meant thereby that the shipowner may not use the space which is left to him for a purpose which is inconsistent with the fulfilment of his obligations to the charterer under the charterparty. It is quite clear that very grave questions might arise if this unrestricted right to use the bunkers existed; as, for instance, in the case of a ship going out from England to Cape Town, we will say, if all the coal were exhausted, and the owners claimed to fill up the bunkers there, so as materially to affect her draught when she got to the other ports. If it can be said that the charterparty means, as the appellants contended, that however the ship is loaded, whatever there is on board of it, the charterer shall bear

C. A. 1907

DARLING v. RAEBURN.

Lord Alverstone C.J.

the cost of lightening; if the clause is to be read in that way, so that every case is included by that clause, then, as Kennedy J. pointed out, the appellants' contention would have been right. I think, on consideration, whatever doubts I may have upon the case, that the reasoning in Kennedy J.'s judgment is right, and that this limit must at least be put upon the rights of the shipowner—that he is not entitled to burden the undertaking or adventure of the charterer by using the space reserved to him for a purpose which has no connection whatever with the voyage on which the vessel is engaged. I think, therefore, that this appeal must be dismissed.

FARWELL L.J. I agree. The conclusion I have come to rests simply on the construction of the charterparty, adding to it nothing more than that warranty, which is always implied in a charterparty such as the present, "that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that the vessel shall then be in a fit state as to repairs, equipment and crew, and in all other respects sufficient to take her under ordinary circumstances to her port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage." I am quoting from A. L. Smith L.J.'s judgment in *The Vortigern*. (1) That coals are part of the equipment of a steamship I cannot doubt. Reading that implied warranty into the contract, it relates to a voyage from South Australia to Delagoa Bay or Cape Town, or to any port or ports between those two. These ports have river bars, or are otherwise so geographically situated that the ship has no wharf at which she can discharge, and accordingly the contract expressly provides that she is to proceed "and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port according to its custom, and there deliver the same agreeably to bill of lading and as customary from ship's tackles into any vessel or at any wharf," and so on. Reading that contract so expressed, it

(1) [1899] P. 140.

appears to me that all that the charterer and shipowner have contracted is that the charterer shall pay for the unloading into lighters from a vessel which is equipped in the manner specified in the contract with sufficient coal to make her seaworthy for the voyage in question; and that it is not, on the terms of this particular contract, consistent with the fair meaning of it that the charterer should pay for such lightening in all cases, when the shipowner, for his own purposes, whether it be for the purpose of sale or of enabling him to continue the voyage beyond Cape Town to Argentina or elsewhere, has chosen to fill up his bunkers with coal to such an extent that he cannot get over the bar at East London. I have simply to construe the contract, according to my own reading of it, from the actual document as it stands with the relevant circumstances at the time of the commencement of the voyage. I think Kennedy J. is entirely right, and I rely upon the way in which he distinguishes the case of *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1), and the custom that was proved there, to shew that it has really no application to the present case.

BUCKLEY L.J. The point in this case is as to the expense incurred owing to the draught of the vessel. The expense arose from the fact that the draught was too great when she got to East London. In the matter of draught there are two limits affecting the charterer: the one is the maximum draught consistent with seaworthiness; the other is such draught as for his purposes the ship must not exceed when she reaches a port which has a bar. The second must not be greater than the first. The shipowner, under the contract, was entitled to load the vessel, and thus affect the draught, to a certain extent; the extent to which he could load is governed by these words—"her tackle, apparel, provisions and furniture." That would include, of course, coal; and he would be entitled to put on board coal consistently with those words. Over and above that it was for the charterer to load the vessel: he might load either to the first limit I have mentioned or to the second; if he

(1) 2 Com. Cas. 173.

C. A. 1907

DARLING v. RAEBURN.

Buckley L.J.

loaded up to the first limit, and the vessel was going to a port with a harbour for which that limit was too high, he would have to discharge cargo and lighten the vessel so as to enter that port. In my opinion that is what the words "and there lighten at receiver's expense as much of the cargo as may be found necessary" refer to. The whole question, therefore, in the case is what, as matter of construction, is the meaning of the words "her tackle, apparel, provisions and furniture"; to what extent was the shipowner entitled to affect the draught? In construing those words regard is to be had to the fact that the contracting parties were the shipowner, who had to see to general equipment of the ship, and the charterer, who was interested in carrying as much cargo as he could upon her; there must be taken to have been in the contemplation of the parties the fact that these were the respective interests of the two persons. What is the charterer bound to contemplate as being in the contemplation of the shipowner in the matter? Mr. Hamilton contends that the shipowner is entitled to put upon the ship not only what is wanted for the voyage, with a margin of coal to carry the vessel to another port where she can reasonably get more coal, if she could not get coal at the last port of discharge, but that he is entitled to load upon the ship coal for a future voyage. I think not. Upon the true construction the words "tackle, apparel, provisions and furniture" are limited, in my opinion, to such an amount of loading falling within those words as is required having regard to the fact that the ship is engaged upon this voyage. There must, no doubt, be allowed a margin for contingencies in the course of the voyage, and a margin to provide for the fact, if it be a fact, that when the vessel gets to her ultimate destination she may be left there without coal, and not be able to get any. Subject to those limitations, the shipowner has, I think, no right to put more load upon the vessel than required for this voyage. What happened was that he loaded up the ship at Durban, where the charterer had lightened for the purpose of getting into East London, and thereby obliged the charterer to lighten her again. In my opinion the consequent expense is not to be borne by the

charterer. I agree with the judgment of Kennedy J., and think that this appeal ought to be dismissed with costs.

C. A. 1907

DARLING v. RAEBURN.

Appeal dismissed.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Botterell & Roche.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A. 1907 *Feb.* 18, 25.

WATSON & SONS *v.* *DAILY RECORD* (GLASGOW), LIMITED.

Practice—Writ—Service out of Jurisdiction—Libel in Newspaper—Injunction—Judicial Discretion—Ord. xi., r. 1 (f).

In an action against a newspaper company registered in Scotland and carrying on business solely in that country, the plaintiffs claimed damages for alleged libels in a newspaper belonging to the defendants and also an injunction against the repetition of the alleged libels within the jurisdiction. The circulation of the newspaper was practically confined to Scotland, although a few copies were sold on the bookstalls at two railway stations just within the English border. The defendants disclaimed any intention of repeating the alleged libels in their newspaper, but intended to justify them at the trial:—

Held that, although by their claim of an injunction against a repetition of the alleged libels within the jurisdiction, and on the assumption that that claim was made bona fide, the plaintiffs had technically brought the case within the provisions of Ord. xi., r. 1 (*f*), the Court, in the exercise of its judicial discretion, ought to refuse leave to issue a writ for service out of the jurisdiction, there being, under the circumstances, no reasonable probability that the plaintiffs would obtain an injunction at the trial of the action.

APPEAL from a decision of A. T. Lawrence J. at chambers, refusing to set aside the service of a writ in an action of libel issued for service out of the jurisdiction.

The defendants were a company domiciled and resident in Scotland, and were the owners of a Scottish newspaper which was wholly edited, printed, and (except as mentioned below) published and circulated in that country. The plaintiffs were a firm of soap manufacturers domiciled and carrying on business

C. A. 1907

WATSON & SONS v. DAILY RECORD (GLASGOW), LIMITED.

in England, and were members of a combination of soap manufacturers, ordinarily known as the Soap Trust, which had ceased to exist before the commencement of the action. The plaintiffs complained that in the issues of their newspaper for October 30 and November 2, 1906, the defendants had published libels in falsely charging them with having reduced the weight of their packets of soap and with selling short-weight packets of soap as 1 lb. packets; they further complained of articles or comments in those issues and in the issue for November 22, in which (inter alia) shopkeepers and the public were advised not to buy the plaintiffs' soaps. Other actions in respect of similar libels had been brought by the plaintiffs against the owners of four English newspapers—the *Daily Mail*, the *Evening News*, the *Daily Mirror*, and the *Leeds and Yorkshire Mercury*—and it was stated that the shareholders in the English company to which those newspapers belonged were to a large extent the same as the shareholders in the defendant company. Upon an affidavit setting forth these facts, and also stating that the paper in question had a large circulation in the north of England and a repetition of the libels was feared unless the defendants were restrained by injunction, and that it would be more convenient and less expensive for the trial to take place in London, leave to issue a writ for service out of the jurisdiction was on December 10, 1906, granted ex parte by a judge at chambers. On December 11 the writ was issued; it was indorsed with a claim for damages for libels contained in the issues of the defendants' newspaper for October 30, November 2, and November 22, and for an injunction restraining the defendants, their servants or agents, from repeating within the jurisdiction the libels contained in the issues of October 30 and November 2. On December 13 service of the writ was effected at the defendants' registered office in Glasgow. The defendants thereupon took out a summons to set aside the writ and the service, at the hearing of which A. T. Lawrence J. made no order upon the summons, but gave the defendants leave to appeal to the Court of Appeal.

From an affidavit of the manager and publisher of the defendants' paper, which was not before the learned judge at chambers, the precise extent of the circulation of the paper within the

jurisdiction appeared to be as follows. The defendants sent daily four and a half dozen copies for sale upon the bookstalls at the railway station at Carlisle, and nine copies for sale on the bookstalls at the station at Berwick; they were sent to these stations as being the nearest stopping places to the Scottish border, and for the convenience of Scottish passengers travelling from England into Scotland. Six copies were daily sent to the defendants' London office, not for sale or distribution, but for the convenience of London correspondents; it appeared, however, that an agent of the plaintiffs had bought three copies of the paper at that office. Twelve copies were also sent daily to a wholesale agent in London, which were taken up by the proprietors of various London newspapers who wished to keep in touch with the publications of their contemporaries.

During the argument it was stated that the defendants had no intention of repeating the alleged libels, but that they intended to justify them if, and when, the action was tried.

Rufus Isaacs, K.C. (*Norman Craig* with him), for the defendants. Leave to issue a writ for service out of the jurisdiction was improperly given. Under Order xi., r. 1 (*f*), the basis of an application for leave is that an injunction is sought by the plaintiff as to something to be done within the jurisdiction. (1) The authorities shew that it is not sufficient that an injunction is in fact claimed upon the writ; the Court must be satisfied that that claim is made bona fide and will be pressed by the plaintiff, and that it is not inserted merely with a view to ground the application and make it technically in order. In the present case it is only in respect of the charges of selling packets

(1) By Ord. xi., r. 1, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever . . . . (*f*) Any injunction is sought as to anything to be done within the jurisdiction, ... whether damages are or are not also sought in respect thereof."

By r. 2, "Where leave is asked from the Court or a judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served. . . . ."

C. A. 1907

WATSON & SONS v. DAILY RECORD (GLASGOW), LIMITED.

of soap short in weight, which were made in the issues of October 30 and November 2, that an injunction is claimed, and there can be no reasonable apprehension under the circumstances that there will be any more attacks upon the plaintiffs upon the ground of selling short-weight soap. No Court would grant an injunction at the trial when there had been no repetition of the libels and no intention to repeat them. Further, the injunction, if granted, would be confined to restraining the circulation of the statements complained of within the jurisdiction, but the circulation of the defendants' newspaper within the jurisdiction is so small as to be immaterial and negligible. It is immaterial that many of the shareholders in the defendant company are likewise shareholders in the English company which owns the four English papers against whom actions are pending; the question is not who are the shareholders, but what is the entity of the company; and that is clearly Scottish. Under the circumstances the application is not made bona fide. The plaintiffs can, if the circumstances warrant it, obtain an interdict in the Scottish Courts. The plaintiffs further contend that they ought to be allowed to sue here and to serve the writ out of the jurisdiction because of the "inconvenience and expense" within the meaning of Order xi., r. 2, of suing the defendants in Scotland; but that consideration is only relevant in a case where the application is bona fide and falls within Order xi., r. 1. In any event the plaintiffs must, under Order xi., r. 2, shew that this proceeding would be more convenient than the concurrent remedy, which is not true of the present case. [They cited *De Bernales* v. *New York Herald* (1); *English and American Machinery Co.* v. *Campbell Machine Co.* (2); *Kinahan* v. *Kinahan*. (3)]

Sir E. H. Carson, K.C., and *Bankes, K.C.* (*Boydell Houghton* with them), for the plaintiffs. Leave to issue the writ for service out of the jurisdiction was rightly given. The only question is whether the plaintiffs are acting bona fide, and that is incontestable, for it cannot possibly be said that they could never expect under any circumstances to obtain an injunction at the trial. The cases cited by the defendants were not really

(1) [1893] 2 Q. B. 97, n. (2) (1895) 39 Sol. J. 449.
(3) (1890) 45 Ch. D. 78.

arguable; in *De Bernales* v. *New York Herald* (1) the writ as originally issued was indorsed with a claim for damages only, but was subsequently amended by adding a claim for an injunction, obviously for the purpose of attracting jurisdiction to the Courts of this country, while in *English and American Machinery Co.* v. *Campbell Machine Co.* (2) it is plain from the judgment of Stirling J. that there was no chance of a renewal of the expiring patent, in respect of the alleged infringement of which the plaintiffs were claiming an injunction. The present action is not an ordinary action of libel, but is a case of a concerted attack upon the plaintiffs by a group of newspapers, and the plaintiffs will insist at the trial upon their right to an injunction. The claim for an injunction is under the circumstances not an idle claim. The test of the right to an injunction is not whether the defendants have ceased the publication of the libels while legal proceedings are pending, for a repetition of the publication would be contempt of Court. An injunction has been claimed, and will be insisted on, in the actions against the English newspapers, for the libels amount to a direct attack upon the plaintiffs' property, and there has been no retractation. The considerations governing the granting of injunctions in actions for libel where the libel affects the character rather than the trade or property of the plaintiff are discussed by the Court of Appeal in *Monson* v. *Tussauds, Ld.* (3), and the present case clearly falls within the principles there laid down. In all reported cases of actions for libel against newspapers it has been an interlocutory injunction which has been sought, and to the granting of interlocutory injunctions different considerations no doubt apply. [They cited *Tozier* v. *Hawkins* (4); *In re Burland's Trade Mark.* (5)] On the question of convenience and expense, it is clearly more convenient that the action should be tried here, where all the other actions will be tried. The defendants are represented by the same solicitors as the defendants in the English actions, and there is not a suggestion that a single witness from Scotland will have to be called. The judge at

(1) [1893] 2 Q. B. 97, n.
(2) 39 Sol. J. 449.
(3) [1894] 1 Q. B. 671.
(4) (1885) 15 Q. B. D. 680.
(5) (1889) 41 Ch. D. 542.

C. A. 1907

WATSON & SONS v. DAILY RECORD (GLASGOW) LIMITED.

chambers has exercised his discretion on that part of the case, and his decision should not be disturbed.

Rufus Isaacs, K.C., in reply, cited *Marshall* v. *Marshall.* (1)

Cur. adv. vult.

Feb. 25. The written judgment of the Court (Collins M.R. and Cozens-Hardy L.J.) was delivered by

COZENS-HARDY L.J. This appeal raises the question whether a writ ought to be issued for service in Scotland upon a newspaper company registered in Scotland and carrying on business solely in Scotland. The writ claims damages for libels contained in three numbers of the *Daily Record and Mail*, and an injunction. It is contended that the case falls within the express language of Order xi., r. 1 (*f*), inasmuch as the writ claims an injunction to restrain the defendants from doing something within the jurisdiction, viz., repeating or continuing the publication of the libel in England; and further, that Order xi., r. 2, does not, under the circumstances, justify the Court in refusing to allow the writ to issue. The defendants deny that the case falls within Order xi., r. 1 (*f*), but if it does, then assert that it falls within Order xi., r. 2.

The alleged libels relate to the Soap Trust, a combination of soap manufacturers, of which the plaintiffs were members. In the issues of October 30 and November 2, 1906, charges were made against the plaintiffs that they were selling short-weight soap. It is in respect of this charge alone that an injunction is sought, although there are other heads of libel in respect of which damages are sought. The defendants, if they are bound to fight this action in England, state their intention to justify the libels.

Now it seems plain that the Court has a discretion, and that a plaintiff cannot acquire a right to serve a defendant out of the jurisdiction by the mere fact that his writ claims an injunction. The Court must at least be satisfied that the claim for an injunction is made in good faith. This was decided by the Divisional Court in *De Bernales* v. *New York Herald* (2), where Lopes L.J.

(1) (1888) 38 Ch. D. 330. (2) [1893] 2 Q. B. 97, n.

said: "I do not believe the claim for an injunction is made bona fide, but merely to bring the case within Order xi. There is no evidence of any apprehended repetition of the libel, and indeed, having regard to the circumstances, it is most improbable that it will be repeated. . . . The giving leave to serve notice of writs out of the jurisdiction is a matter of judicial discretion." It must not be inferred from the language used by Lopes L.J. in that case that want of good faith is a complete or exhaustive statement of the grounds for refusing to order service out of the jurisdiction. If the Court is satisfied that, even assuming the plaintiff to have a good cause of action, there is no reasonable probability that he will obtain an injunction, the Court ought not to consider the insertion of a claim for an injunction as sufficient to justify service on a person resident out of the jurisdiction. The Court is bound to consider all the circumstances disclosed by the affidavits, and to take care that a Scotchman, or it may be a foreigner, is not improperly made amenable to the orders of an English tribunal.

Now the facts in the present case are very peculiar: (1.) The action being for libel, it is not argued that an interlocutory injunction could reasonably be applied for: *Bonnard* v. *Perryman.* (1) Nothing could be done until after a verdict at the trial in favour of the plaintiffs, and the trial cannot take place, at the earliest, before June or July. (2.) The "short-weight" libels appeared only in two numbers issued in October and November, 1906, of an ephemeral publication. There is an essential distinction between a book, the issue of which under normal conditions will be repeated for months or years, and a daily newspaper, which practically is only issued once. The libels have not since been repeated, and the defendants say they have "no intention of repeating" them. The Soap Trust combination has been formally dissolved, and has ceased to be a topic of public interest. It is not reasonable to suggest that, after verdict, the libels would be reprinted or repeated. (3.) The circulation of the defendants' paper is, for all practical purposes, confined to Scotland. Only a few dozen copies are supplied to railway bookstalls at Carlisle and Berwick. (4.) Although libels

(1) [1891] 2 Ch. 269.

C. A. 1907

WATSON & SONS v. DAILY RECORD (GLASGOW), LIMITED.

contained in newspapers are numerous and occupy a great deal of the time of the Courts, there is no reported instance in which an injunction has been granted against a newspaper, even when heavy damages have been recovered. And it is doubtful whether an injunction has ever been seriously applied for after verdict.

Under these circumstances, we ought to hold that, although the plaintiffs have brought the case within the words of Order xi., r. 1 (*f*), the Court, in the exercise of its judicial discretion, ought not to allow the writ to issue for service in Scotland. In the view which we take it is not necessary to consider the point arising under Order xi., r. 2. The appeal must be allowed with costs here and below.

Appeal allowed.

Solicitors for plaintiffs: *Vincent & Vincent, for Day & Yewdall, Leeds.*

Solicitors for defendants: *Lewis & Lewis.*

W. J. B.

C. A. 1907 *Feb.* 28.

[IN THE COURT OF APPEAL.]

CRITCHELL *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Practice—Striking Out Defence—Abuse of Process of the Court.

The defendants in an action to recover damages for negligence brought by a foreigner residing out of the jurisdiction, after obtaining an order that the plaintiff should give security for costs (with which he complied), delivered a defence in which they denied the negligence and paid a sum of money into Court with a denial of liability. With the defence was delivered a letter written by the defendants' solicitor, in which, after stating that the traverse of negligence was a technical plea merely to secure that the money paid into Court should remain there until the trial unless taken out by the plaintiff in satisfaction of his claim, he unreservedly undertook on behalf of the defendants not to contest liability at the trial:—

Held, that the defence was a sham defence, and must be struck out as being an abuse of the process of the Court.

Remmington v. *Scoles*, [1897] 2 Ch. 1, considered and applied.

APPEAL from chambers.

The action was brought to recover damages for personal

injuries sustained by the plaintiff, a subject of the United States residing at Chicago, in an accident on the defendants' line of railway owing to the negligence of their servants. After the delivery of the statement of claim the defendants took out a summons in which they asked (1.) for further particulars, (2.) for security for costs on the ground that the plaintiff resided out of the jurisdiction; and (3.), as an alternative to (2.), that such money as the defendants should pay into Court with their defence should not be paid out to the plaintiff or his solicitors before trial unless accepted in satisfaction of the plaintiff's claim. Upon this summons Master Chitty made an order for further particulars and for security for costs to the amount of 100*l.*, but refused to make any order on the third branch of the application. By their defence, which was contained in three paragraphs, the defendants (1.) denied that the plaintiff had sustained the injuries or suffered the damage alleged; (2.) did not admit that their servants were negligent; and (3.) alternatively, and while not admitting liability, they brought a sum of money into Court as sufficient to satisfy the plaintiff's claim. Together with the defence the defendants delivered to the plaintiff's solicitors a letter signed by their assistant solicitor, which (omitting formal parts) was as follows:—

"I now send you the defence in this action. As you know, the defendants will not put the plaintiff to the trouble and expense of proving their liability at the trial, and you will understand that they traverse the allegation of negligence as a technical plea merely to secure that the money paid into Court may remain there until trial unless taken out in satisfaction. The defendants are compelled to adopt this course owing to your refusal to accept their very reasonable suggestion, viz.: that as your client is a well-to-do American citizen without property within the jurisdiction of the Court, a substantial part of the money paid in should, if the action proceeds, remain in Court by consent, until the amount of damages is determined. Even now if on reconsideration you will agree to this course, the defendants will at once strike out their traverse of negligence and leave as the only formal issue on the record, what is and always has been the only issue in substance, the question what amount of damages

C. A. 1907

CRITCHELL v. LONDON AND SOUTH WESTERN RAILWAY.

is to be paid to your client. I do not write without prejudice, and in order to make the position quite clear I hereby on behalf of the defendants unreservedly undertake not to contest liability at the trial, when you will be at liberty to use this letter as an admission of liability if you think fit."

The plaintiff thereupon took out a summons asking that paragraphs 1, 2 and 3 of the defence should be struck out on the ground that they were embarrassing and an abuse of the process of the Court. The summons was heard by Master Macdonell, who refused to make an order, and his decision was affirmed on appeal by Walton J., who, however, gave the plaintiff leave to bring the present appeal to the Court of Appeal.

Hugo Young, K.C., and *Wood Hill*, for the plaintiff. The defence should be struck out as being an abuse of the process of the Court. The letter accompanying the pleading shews that the defendants have put a sham defence on the record within the decision in *Remmington* v. *Scoles* (1), where a defence was pleaded in which statements were denied that had been admitted on oath by the defendant in previous proceedings. The defendants are endeavouring to prevent the application of the rule laid down in *Wagstaffe* v. *Bentley* (2), by which, where a defendant denies the negligence and pays a sum of money into Court with a denial of liability, the plaintiff is entitled to his costs on the issue of negligence, although he recovers at the trial less than the sum paid into Court. The practical effect of the order appealed against is to give the defendants security for costs in a far larger sum than the Master thought sufficient.

Acland, K.C., and *J. A. Simon*, for the defendants. The defendants are entitled to avail themselves of the rules of procedure to protect their own interests, and there is no case where the Court has interfered to prevent a litigant from using the practice of the Court. The object of the defence is not to hinder or delay the plaintiff. Every issue is properly pleaded, and the defendants have merely given a formal notice to the plaintiff that they will not require him to prove one of the three issues. The course taken by the defendants is reasonable and

(1) [1897] 2 Ch. 1. (2) [1902] 1 K. B. 124.

proper under the peculiar circumstances of the case. The facts of the case do not bring it within the authority of *Remmington* v. *Scoles*. (1) [They also cited *Reichel* v. *Magrath*. (2)]

COZENS-HARDY L.J. With the greatest respect for the opinion of the learned judge at chambers, I think that this is a reasonably plain case. We have here an admission of the most formal and complete kind accompanying the defence—a letter not written without prejudice, in which the defendants' solicitor says that the defendants will not traverse the allegation of negligence at the trial, and that the traverse in the defence itself is merely a technical plea. The letter goes on to say: "In order to make the position quite clear I hereby on behalf of the defendants unreservedly undertake not to contest liability at the trial, when you will be at liberty to use this letter as an admission of liability if you think fit." What does that mean? It is obviously a most formal admission of the liability of the defendants for all purposes of this action. The defendants are of course not bound to pay money into Court, but, if they do so, can they under the circumstances be allowed to pay into Court with a defence denying liability? In my opinion this is plainly a sham defence in the sense in which that term is used in *Remmington* v. *Scoles* (1); in one and the same breath the defendants deny the negligence, and accompany their denial with a formal letter saying that for all purposes they admit liability. The object of the defendants is plain. Payment of money into Court involves different consequences according to whether it is accompanied by a plea of denial of liability or not; but it is quite impossible that the defendants can be allowed to reap the benefit of a denial of negligence as well as the benefit of admitting it. The defendants endeavoured by means of a summons, which was properly directed for that purpose, to obtain directly an order preventing the plaintiff from taking the money out of Court unless he accepted it in satisfaction of his claim. It is not for us to say whether the Master's decision on that summons was right or wrong, as it is not before us; but the defendants cannot be permitted by this indirect means to get the relief which they

(1) [1897] 2 Ch. 1. (2) (1889) 14 App. Cas. 665.

C. A. 1907

CRITCHELL v. LONDON AND SOUTH WESTERN RAILWAY.

failed to obtain on the summons before the Master. Of course the striking out of the defence will not prevent the defendants denying the damages which the plaintiff alleges he has suffered; they must have leave to take the money out of Court and to plead afresh.

FLETCHER MOULTON L.J. I am of the same opinion. The rules make it plain that where a defendant admits his liability and pays money into Court simply to meet the plaintiff's claim for damages, the plaintiff has a right to take the money out and use it, unless in a particular case the Court thinks otherwise. Here the Master was asked whether he thought that this was one of these exceptional cases, and he decided that it was not. Thereupon the defendants try by this ingenious method to obtain the advantages of paying money into Court without a denial of liability, while by making their defence technically deny liability they keep the plaintiff from obtaining the money until after the trial. In my opinion that is an abuse of the process of the Court, and this appeal must be allowed. The defence must be struck out, but the defendants will be at liberty to take the money out of Court and to deliver a fresh defence within ten days.

Appeal allowed.

Solicitors for plaintiff: *Dawes & Sons.*
Solicitor for defendants: *S. Bircham.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1907
Feb. 21.

In re TYLER.

Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Mortgage of Life Policy—Voluntary Payment of Premiums by third Party—Death of Mortgagor—Repayment of Premiums to Volunteer out of Policy Moneys—Duty of Trustee.

The principle established by *Ex parte James*, (1874) L. R. 9 Ch. 609, that the Court of Chancery will not allow its officer, the trustee in bankruptcy, to retain moneys for distribution amongst the creditors, where it would be contrary to fair dealing to do so, is not confined to the case of money paid under a mistake of law, but is of general application.

The bankrupt having assigned a policy on his own life by way of mortgage to his bankers, requested his wife on the eve of his bankruptcy to pay the premiums and interest for him, and she, after paying one premium before the commencement of the bankruptcy, paid the premiums and interest during his bankruptcy until his death, when the policy moneys were received by the mortgagees, who retained thereout the amount due to them on their mortgage and paid the balance to the official receiver. The wife claimed to be repaid out of the balance the sums she had paid for premiums and interest. The official receiver had no previous knowledge that the wife had been making these payments, but it subsequently appeared that this fact had been disclosed by the bankrupt in his preliminary examination taken before a former official receiver. The official receiver moved for a declaration that he was entitled to retain the balance of the policy moneys as part of the bankrupt's estate:—

Held, even assuming that all the payments were made during the bankruptcy, that the Court ought not to allow the official receiver, having regard to the knowledge of his predecessor, to retain the policy moneys without repaying to the wife the sums she had paid for premiums and interest.

Decision of Bigham J. affirmed.

The principle of *Ex parte James*, L. R. 9 Ch. 609, applied.

Appeal from a decision of Bigham J.

The agreed facts were as follows: On January 29, 1896, William Tyler committed an act of bankruptcy. On April 21, 1896, a petition was presented against him, in respect of which a receiving order was made on July 16, 1896, and he was duly adjudicated a bankrupt on August 27, 1896. Frederick W. Davis was appointed trustee on August 31, 1896, but he was subsequently released, and Egerton Spencer Grey, as official receiver,

C. A.
1907

TYLER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

was now ex officio trustee of the bankrupt's property. At the commencement of the bankruptcy the bankrupt was entitled to two policies of assurance effected on his own life with the Guardian Assurance Company, one for the sum of 300*l.* at an annual premium of 9*l.* 19*s.* 3*d.*, and another for the sum of 500*l.* at an annual premium of 16*l.* 12*s.* 1*d.* By a mortgage dated April 13, 1893, the bankrupt assigned these policies to Messrs. Child & Co., bankers, to secure an overdraft of 400*l.* The mortgage contained a covenant by the mortgagor to pay the premiums, and that if the mortgagor should at any time neglect or refuse to pay the premiums it should be lawful for the mortgagees to pay them, and that the mortgagor would on demand repay to the mortgagees all sums paid in that behalf, with interest thereon at 5 per cent. from the respective times of payment; and it was thereby declared and agreed that in the meantime the policies should stand charged with the payment of such sums with interest thereon.

Towards the end of the year 1895 the bankrupt became financially embarrassed, and he informed his wife that he was unable to continue the payment of the interest on the loan of 400*l.* and the premiums on the policies, and he accordingly requested his wife to make these payments for him in order to prevent the premiums being paid by the mortgagees or the policies being sold or lapsing, and he stated that if his wife was prepared to do this he would repay her the amount expended by her as soon as he got his financial affairs straight. In accordance with such request the bankrupt's wife instructed Messrs. Child & Co. to pay the interest due to themselves and the premiums due to the assurance company as and when they became due and to debit her account with them with such payments, and this they continued to do from the time when she gave them instructions, viz., in the month of December, 1895, until the death of the bankrupt in March, 1906. The total amount paid by the bankrupt's wife for premiums and interest on the loan was 481*l.* 14*s.* 2*d.* The moneys having become payable under the policies in consequence of the death of the bankrupt, the Guardian Assurance Company paid to Messrs. Child & Co. 936*l.* 10*s.*, being the policy moneys and bonuses due under the two policies, and there

remained in the hands of Messrs. Child & Co., after payment of the principal and interest of their loan and their solicitors' costs, the sum of 514*l.* 16*s.* 8*d.* This sum was in consequence of a notice served upon them paid to the official receiver. The widow claimed to be repaid out of the sum of 514*l.* 16*s.* 8*d.* the sum of 481*l.* 14*s.* 2*d.*, being the amount paid by her for premiums and interest. It appeared from the bankrupt's statement of affairs that he was at the commencement of the bankruptcy entitled to the policies subject to the mortgage thereon in favour of Messrs. Child & Co. At the commencement of the bankruptcy the amount due to Messrs. Child & Co. on the security of the policies was in excess of the surrender value of the policies. The official receiver moved for a declaration that this sum of 514*l.* 16*s.* 8*d.* formed part of the property of the bankrupt divisible amongst his creditors.

Bigham J. held that, although the widow had no legal right, and probably also no equitable right, to be recouped the 481*l.*, the trustee, as an officer of the Court, must do what was just and right. It would be a great injustice if the creditors put the 514*l.* into their pockets without refunding to the widow the moneys she had paid to keep the policies on foot. There would be an order for payment to the widow of the 481*l.* out of the 514*l.*

The official receiver appealed.

Until the wife made her claim for these payments neither Davis nor Grey had any knowledge that the bankrupt's wife was continuing to pay the interest and premiums after the commencement of the bankruptcy; but since the date of Bigham J.'s order it had come to Grey's knowledge that the bankrupt, in his preliminary examination taken in January, 1901, by a former clerk of his predecessor in office, stated that his life was insured in the Guardian Life Assurance Company for 400*l.*; that the policy was held by Messrs. Child & Co. to secure 400*l.* and 5 per cent. interest; and that his wife had always paid the interest and the premiums. This examination was never seen by Davis, who had obtained his release before the examination took place. The bankrupt was never publicly examined, his public examination having been adjourned sine die on May 11, 1897, in consequence of his failure to appear.

C. A. 1907

TYLER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

The Solicitor-General (*Sir W. Robson, K.C.*) and *Hansell*, for the official receiver. Bigham J. proceeded upon the principle of *Ex parte James* (1) and *Ex parte Simmonds* (2), and held that the widow was entitled to be repaid these moneys on principles of right and justice, although she had no legal or equitable right to the money, but those cases are confined to the special case of money paid under mistake of law.

[FARWELL L.J. The same principle has been applied by the Court of Chancery in *Else* v. *Else* (3) in dealing with the effect of conditions of sale in precluding the purchaser from raising objections to title.]

That was a sale by the Court itself, but here we are not dealing with the acts of the Court. This is an extension of the principle laid down in the two cases above cited, and if it is pressed to the full the general creditors can never be sure that they have acquired any rights at all. Great difficulties will arise in the administration of bankruptcy if the Court is to decide according to what it considers high-minded without regard to law or equity.

[In the course of the argument it was ascertained that one premium was paid by the wife before the commencement of the bankruptcy.]

Whinney, for the wife.

[The arguments in the next case of *In re Hall* (4), which raised a similar question upon different facts, were heard before judgment was given in this case.]

VAUGHAN WILLIAMS L.J. In this case I think the judgment of Bigham J. is quite right. In truth and in fact the object of this appeal is to induce the Court to say that the decisions in *Ex parte James* (1) and *Ex parte Simmonds* (2) are limited to the particular case of money paid under a mistake of law. In my opinion, in those two cases the Court of Appeal did not intend to limit their decision to that particular case, but intended to decide as a general principle that which James L.J. at the end of his judgment in *Ex parte James* (1) laid down as the duty of the Court. He says: "I am of opinion

(1) L. R. 9 Ch. 609.
(2) (1885) 16 Q. B. D. 308.
(3) (1872) L. R. 13 Eq. 196.
(4) Post, p. 875.

that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to someone else ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." Of course, one must bear in mind the facts of the case; but what were the facts of the case there? In that case the money had been paid under such a mistake of law that it could not be recovered by any judicial process whatsoever—whether in law or equity. When James L.J. says that the trustee has in his hands money which in equity belongs to somebody else, he is not referring to an equity which is capable of forensic enforcement in a suit or action, but he is referring to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as honest as other people. In *Ex parte Simmonds* (1) Lord Esher states exactly the same principle: "When I find that a proposition has been laid down by a Court of Equity or by the Court of Bankruptcy which strikes one as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by James L.J. in *Ex parte James.* (2) A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James L.J. laid it down in *Ex parte James* (2) that, although the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law." It seems to me that those two

(1) 16 Q. B. D. 308. (2) L. R. 9 Ch. 609.

C. A. 1907

TYLER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Vaughan Williams L.J.

decisions clearly lay down a general principle, and that they are not limited to the particular case of mistake of law, and I think that we ought to follow those decisions. I know it is said that it opens the door dangerously wide when you allow the Court or its officer to order money to be repaid in a case where there is no legal right of recovery; but it must be remembered that, although these decisions allow those who are acting judicially in bankruptcy to exercise this discretion, the discretion which is given must be acted on on judicial principles. It is not a case in which there is no appeal. If we thought that Bigham J. had exercised his discretion upon other than proper judicial principles we should hold that he was wrong; but in this particular case, having regard to the fact that these policies were entered into by the bankrupt before the commencement of his bankruptcy, and then the wife at his request advanced the money to pay the premiums, it seems tolerably plain, quite irrespective of the rule in *Ex parte James* (1) and *Ex parte Simmonds* (2), that she had such an interest in the policies as entitled her to prevent the trustee or other representative getting the benefit of those policies without recouping the premiums which she had paid. That would be sufficient to dispose of the case, but I do not wish to dispose of it only on that ground, especially as the Solicitor-General is asking the Court to determine what is the true principle laid down in *Ex parte James* (1) and in *Ex parte Simmonds.* (2) To go on with my story, we find that it came to the knowledge of the trustee for the time being, from the preliminary examination of the bankrupt, that the wife was paying these premiums or some premiums. I pause here to say that, in my opinion, it makes not the slightest difference to the representation of the estate whether there is one trustee throughout or whether there are several trustees; if any question arises as to the knowledge of the trustee, the knowledge of the first trustee is the knowledge of the second for such a purpose. Nor does it matter, to my mind, whether in his preliminary examination the bankrupt gave an exact description of the policies in respect of which the premiums were paid, or whether he even stated the amount of the premiums correctly. There was quite enough to

(1) L. R. 9 Ch. 609. (2) 16 Q. B. D. 308.

put the trustee on inquiry, and in this state of things the wife goes on paying the premiums, and ultimately the bankrupt dies and the trustee wishes to take the benefit of these policies without any regard to the fact that the wife has been paying the premiums which had kept the policies alive. In my judgment, to use the words of James L.J., the Court would be allowing its officer to do a thing which, from a moral point of view, would be dishonest if it allowed the trustee to keep the whole of the sum realized by the policies without any recognition of the rights of the wife in respect of those payments. The appeal must be dismissed.

FARWELL L.J. I agree. I have very little to add; but on this general question, which is one of some importance, and is quite familiar in the administration of estates in the Chancery Division, I should like to say what is my understanding of the principle on which the Court proceeds, because it is obvious that this discretion cannot be left to be regulated according to the length of the foot, to use an old phrase, of the particular judge who has to exercise it. Our Courts have two functions, one to decide rights between the parties and the other to administer estates. In administering estates, whether in Chancery, bankruptcy, or the winding up of companies, the Court itself by its officer often finds itself in the position of a quasi-litigant. As I understand the principle laid down in the cases to which my Lord has referred, it comes to this, that the officer of the Court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life. It would be insufferable for this Court to have it said of it that it has been guilty by its officer of a dirty trick. Test that by the case before James L.J. of money paid under mistake of law. Theoretically both sides know the law. Therefore the man who is receiving knows that he is receiving that to which he is not lawfully entitled. No high-minded man, of course, would dream of doing such a thing, and the Court will not allow its officer to put it in the position of insisting upon its right to keep money which it has received from a third party, with full knowledge

C. A. 1907

TYLER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Farwell L.J.

that he was not bound to pay the money, and also with full knowledge that he was not aware of that fact. The rule of law may be so, but the Court will not allow its officer to act upon it. In this case I will assume that this lady had not a charge on the policy moneys for the premiums she had paid, although I think she had. The trustee in bankruptcy is told that the bankrupt's life is insured, and that the wife has always paid the premiums, and he takes no further steps. He knew that if the premiums were not paid the policies would lapse. He knew that the wife had been paying, and he assumed that she would go on paying the premiums, otherwise he was bound to pay the premiums himself or get them paid. Inasmuch as by recent decisions the person who pays premiums cannot, contrary to what was thought some years ago, put in force in his own favour the doctrine of salvage and so recover the premiums by which alone the policy has been preserved, to my mind it would certainly not be in accordance with fair dealing—that open, honest dealing to which reference has been made—that the Court should allow its officer to say, "I knew the wife was paying, and I let her go on paying, and said nothing to her to lead her to believe that I was going to claim the policy moneys at the end without repaying the premiums which she had paid." I do not suggest that the officer of the Court actually went through that mental process in this case, or that he intended to make an unfair claim against the wife; but when it comes to be analysed that is the process which is gone through theoretically if not actually, and that is the dirty trick which James L.J. said the Court would not allow to be played upon it. Certainly that equity, so to call it, is not confined to the case of money paid under mistake of law. I have already referred to one case of vendor and purchaser—*Else* v. *Else* (1)—where the principle was applied to the construction of conditions of sale; and I find the same principle stated in *In re Banister*. (2) Fry J. says: "Another thing equally plain is this, that where the conditions of sale are framed in bad faith, so as in effect to trap the purchaser, the Court will not hold him to be bound. It is also perfectly plain that, where the sale is under the direction of the

(1) L. R. 13 Eq. 196. (2) (1879) 12 Ch. D. 131, 136.

Court, the Court will lean, if possible, to a more exact requirement of good faith and honesty on the part of the vendor; it will endeavour to insist upon that fair, straightforward, honest, open dealing which ought to characterize transactions between vendor and purchaser." Cotton L.J. says (1): "I think in a case of this sort, where the sale is by the Court, the Court is bound to take more especial care, if possible, that there shall be nothing in the conditions, or in the representations therein contained, which by possibility can mislead a vendor, because the purchaser has a right to assume that the Court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting." Adopting those principles, if they are applied with judicial discretion I see no such risk as has been held out to us by the Solicitor-General, and I think that Bigham J's. decision was quite right.

BUCKLEY L.J. In *Ex parte James* (2) James L.J. speaks of money which in equity belongs to some one else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense, and not in the sense of money which in a Court of Equity would belong to some one else. I think the context of his judgment plainly shews that that was his meaning. In *Ex parte Simmonds* (3) Lord Esher, referring to *Ex parte James* (2), says that the Court will direct its officer to act as any high-minded man would act, namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do. In *Ex parte Simmonds* (3) the Court were extending the doctrine of *Ex parte James* (2) in this sense, that they were holding, not merely that if the trustee had the money still in his hands he ought to hand it to the person who in point of justice was entitled to it, but that if he had parted with the money but there

(1) 12 Ch. D. 150. (2) L. R. 9 Ch. 614.
(3) 16 Q. B. D. 308.

C. A. 1907

TYLER, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Buckley L.J.

was other money coming in from the bankruptcy he ought out of such other money to make good the fund which he had by error misappropriated. Applying that principle to this case, the facts may be stated very shortly. The wife had in December, 1895, paid a premium, and from that time forward down to 1901 she continued to pay the premiums, upon these policies. In 1901 the trustee, by the preliminary examination, learned that she was paying the premiums, and, although it is said that he learned also from what was there said that the policies were mortgaged to their full extent, I think that that does not make any difference, because he was bound to inquire. He knew in 1901 that there were policies and that the wife was paying the premiums on those policies. Knowing that, he allowed those payments to go on from 1901 to 1906. In 1906 the life dropped. Under these circumstances, looking beyond rights enforceable in a Court of Law or Equity, the real fact is that the policy moneys payable in 1906 originated from and owed their existence to the premiums which the wife to the knowledge of the trustee had paid, and it would be grievously unfair, and contrary to natural justice between man and man, that whereas she kept up the policy yet when the life dropped somebody else should take the money. She may not have an enforceable claim, but as matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say "I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid." That is not consistent with justice, and no high-minded man would do it. The principle of *Ex parte James* (1) applies to this case. Beyond that, inasmuch as the wife paid a premium in 1895 before the act of bankruptcy, she acquired certain rights in respect of the policies. The decision of Bigham J. in my opinion is right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; Finch & Jennings.*

(1) L. R. 9 Ch. 614.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1907
Feb. 21.

In re HALL.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy— Composition—Dissentient Creditors—Payment by third Person of assenting Creditors—Notice of act of Bankruptcy—Ignorance of Law—Duty of Trustee.

The bankrupt having mortgaged two fishing boats to some fish salesmen to secure his current account with them, and having subsequently failed in his business, the mortgagees offered to pay his creditors a composition which nearly all the creditors agreed to accept, and, after having notice that the debtor had committed an act of bankruptcy, they paid this composition in good faith to the assenting creditors, believing that they were entitled under their mortgage to add the money so paid to their security. They then sold the fishing boats, and claimed to retain the balance of the proceeds of sale, after paying themselves the amount due on their mortgage at the date of the act of bankruptcy, on account of the composition paid to the creditors. The official receiver applied that the balance might be paid over to him :—

Held, that the mere fact that the mortgagees were not familiar with the working of the bankruptcy law was not a ground for precluding the official receiver from insisting on his right to treat this balance as part of the debtor's estate, and that the money ought to be paid over to him.

Decision of the Divisional Court, affirming the decision of the county court judge, reversed.

Ex parte James, (1874) L. R. 9 Ch. 609, distinguished.

Appeal from a decision of the Divisional Court, affirming a decision of the county court judge at Yarmouth.

The bankrupt, who was a fishing-boat owner, had mortgaged two boats, with their nets and gear, to Messrs. Hobson, fish salesmen, to secure the general balance of his current account with them. In November, 1905, owing to the loss of two fleets of fishing nets, the bankrupt became unable to continue his business, and he accordingly paid off the crews of these two boats and placed himself in the hands of Messrs. Hobson, who were his principal creditors. Messrs. Hobson took possession of the boats and their nets and gear, which were substantially the whole of the bankrupt's assets. In December, 1905, Messrs. Hobson prepared a document for the bankrupt to take round to his

C. A. 1907

HALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

creditors for the purpose of enabling him to carry through a composition of 4*s.* in the pound which Messrs. Hobson were prepared to pay. Twenty-seven out of thirty-four creditors were willing to accept this composition, but the remaining seven, whose debts amounted in the aggregate to 115*l.* odd, declined to accept it. On February 6, 1906, the bankrupt committed an act of bankruptcy by giving notice to his creditors of suspension of payment, and on March 17 a receiving order was made against him on his own petition. In the meantime, viz., on February 26, Messrs. Hobson paid to the assenting creditors the sum of 158*l.* 5*s.* 6*d.* in dividends. At this date Messrs. Hobson had notice of the act of bankruptcy, but they were acting bona fide in the interests of the creditors as a whole, and they believed that they were justified in making these payments under their mortgage and that they could add the amount to their security. In April, 1906, Messrs. Hobson sold the two boats, and the net proceeds of the sale amounted to 479*l.* 8*s.* 9*d.* After paying themselves the sum of 333*l.* 13*s.* 9*d.*, being the amount due on their mortgage on February 6, they claimed to retain the balance of 145*l.* 15*s.* on account of the 158*l.* 5*s.* 6*d.* which they had paid to the creditors.

The official receiver moved that Messrs. Hobson might be ordered to pay over to him this balance.

The county court judge, being of opinion that the estate had benefited by the act of the mortgagees, held on equitable grounds that they ought to be allowed to retain the balance in question, and refused the motion.

The official receiver appealed to the Divisional Court (Bigham and Darling JJ).

Bigham J., who delivered the judgment of the Court, held that the county court judge had a discretion in the matter, and that they ought not to interfere with the exercise of his discretion.

The official receiver now appealed to the Court of Appeal.

The Solicitor-General (*Sir W. Robson, K.C.*) and *Hansell*, for the official receiver. There is no ground for saying that the official receiver ought not to claim this balance. This is the same thing as if the debtor had himself made the offer. The

principle of *Ex parte James* (1) does not apply to the facts of this case.

[They were stopped.]

Herbert Reed, K.C., and *Ringwood*, for the mortgagees. The mortgagees made these payments to the creditors in the belief that they could add the money to their security. They acted bona fide and in ignorance of the effect of the bankruptcy law. As the estate has had the benefit of these payments, it is unfair that the official receiver, as the officer of the Court, should insist upon his claim to these moneys. If the Court should be of opinion that the official receiver is entitled to succeed, we, the mortgagees, ask that the order may be made without prejudice to their right to stand in the shoes of the creditors, whose debts they have paid.

VAUGHAN WILLIAMS L.J. It appears from the judgment of Bigham J. in this case that he thought that it could be disposed of by the application of the rule in *Ex parte James* (1), on which we have just decided *In re Tyler*. (2) As I understand the facts in this case, there is no room for the application of any such doctrine. Here the debtor was commercially ruined by some destruction of property for which he was not responsible. Messrs. Hobson, his largest creditors, seem to have been benevolently disposed towards this unfortunate man, who had been reduced to insolvency and consequent bankruptcy by misfortune. Messrs. Hobson, who had advanced money to the debtor on the security of a mortgage which covered not only the immediate advance made on the occasion of the execution of the mortgage, but also future advances, having notice that the debtor had committed an act of bankruptcy, and having, as is shewn by their course of action, some considerable understanding of the effect which the bankruptcy would have on the debtor's right to deal with his own property, provided money for the payment of his creditors to the extent of 4*s.* in the pound, and tried to induce the creditors to accept that sum in satisfaction. I do not pretend to say at the present moment what the exact effect of that transaction was. It might possibly be looked at as an advance of 4*s.*

(1) L. R. 9 Ch. 609. (2) Ante, p. 865.

C. A. 1907

HALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Vaughan Williams L.J.

in the pound to the bankrupt to enable him to carry through a composition. If that were so, I think that there might be a very great difficulty in Messrs. Hobson making any claim in the administration in respect of that advance, which they made to the debtor with full knowledge of the act of bankruptcy. But possibly the truer view of this transaction is to treat the 4*s.* as the price which Messrs. Hobson paid to each creditor for buying up from him his individual claim. In that case it may be that Messrs. Hobson would have the right to prove and rank on the debtor's estate as creditors. I have not to decide those matters, and I do not decide them. Of course, one would be glad that in some way or other it should work out that the creditors ranking on the debtor's estate should not get the estate swelled by the payment of 4*s.* in the pound without recognizing any right of Messrs. Hobson in respect of that 4*s.* One would be glad if in the administration Messrs. Hobson could come in as standing in the shoes of the creditors to whom they paid the 4*s.* and rank upon the estate, but I have nothing to do with that here. The only question we have to consider is whether in this state of facts there is any ground for saying that we can apply the doctrine of *Ex parte James* (1) to the present case. I see no ground at all. All that is said here is that Messrs. Hobson were not very familiar with the law of bankruptcy. Suppose that is so, it is manifest that the trustee is under no obligation to recoup these people out of the surplus that remains after the realization of the mortgaged property and the payment of the mortgage debt. The surplus, of course, would come back to the debtor in his right as being the owner of the equity of redemption. Under these circumstances I cannot understand how it can be said that it would be dishonest, or something that a high-minded man would not do, to insist that this surplus should be treated as part of the debtor's estate and handed over to the official receiver representing the estate. Mr. Ringwood, in putting the case in the only way in which it could be put, said that the estate had benefited by the payment of this 4*s.* I do not see it myself, and, with all respect to the Divisional Court, I think that there is no case for the application of the doctrine of *Ex parte*

(1) L. R. 9 Ch. 609.

James. (1) I think that this appeal must be allowed with costs.

FARWELL L.J. I agree. The distinction between this and the last case (*In re Tyler*) is to my mind apparent. In this case the officer of the Court has neither done nor omitted anything which could give rise to the suggestion that he has committed the Court to a course of conduct which is in any way unworthy of its dignity. The mortgagees chose to make these payments of 4*s.* in the pound on their own initiative without a suggestion from the trustee, in the hope of avoiding the bankruptcy by carrying through the composition. I have already explained that the principle is that the officer of the Court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the Court so as to commit the Court to acts which it would feel bound to repudiate. In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums and the fact that the wife was paying them. Different considerations would have arisen altogether if the trustee had been ignorant of the existence of any policy at all and then, after the life had dropped, the wife had come to the trustee and said that she had been paying the premiums. That would have been a mere mistake of law, which I will deal with when it arises, but certainly I should require to consider a good deal more closely before I decided that case in favour of the wife, because to my mind the principle rests on the act or omission of the trustee in bankruptcy acting as the officer of the Court, and not on any mere mistake made by a third person with whom the officer has nothing to do. In this particular case the officer has nothing whatever to do with the payments which were made, or with the ignorance of bankruptcy law of the people who made them. I therefore think that in this case the discretion has been wrongly exercised.

BUCKLEY L.J. In this case the official receiver, as trustee, moved the county court judge for an order directing Messrs.

(1) L. R. 9 Ch. 609.

C. A. 1907

HALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Buckley L.J.

Hobson & Co., who were mortgagees, to pay to the official receiver a certain sum of 145*l.* odd, the balance remaining out of the 479*l.* for which they had sold the mortgaged property, after deducting 333*l.*, which was the amount of the mortgage debt. The learned county court judge refused that motion without costs. The official receiver appealed to the Divisional Court, and the Divisional Court dismissed the appeal with costs. In my opinion both those orders were erroneous, the official receiver was entitled to the order for which he applied to the county court judge. In the Divisional Court Bigham J., who delivered the judgment, appears to have rested it on this, that, notwithstanding that the mortgagees had notice of the act of bankruptcy, they being mortgagees for past and future advances, and believing that they were justified in acting as they did, were entitled to pay the 4*s.* in the pound and add the amount to their security. I myself cannot understand how it can be possible that mortgagees for past and future advances, after notice of an act of bankruptcy, can be entitled to make further payments and add them to their security. I do not think that the judgment can be sustained on that ground. Then it is said that in some way or other the principle of *Ex parte James* (1) applies, but I fail to see that that case has any application to the present case. The facts were that the mortgagees, who seem to have had motives of benevolence towards the debtor, and who were anxious to keep him on his legs, paid a large proportion of his creditors 4*s.* per pound on their debts, and paid away for that purpose a sum of 158*l.* Their contention is that because they did that they are entitled to the proceeds of the equity of redemption of the mortgaged property after discharging the mortgage debt. I fail to see any facts which could bring *Ex parte James* (1) into play. The appeal must be allowed, and there must be an order upon Hobson & Co. to pay the balance to the official receiver.

Appeal allowed.

Solicitors: *Solicitor to the Board of Trade; Dubois & Co., for Chamberlin & Talbot, Great Yarmouth.*

(1) L. R. 9 Ch. 609.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1907
Feb. 8.

THE KING *v.* GARRETT AND OTHERS.

London—Carriage Road not repairable by Inhabitants at large—Repairs by Local Authority—Recovery of Expenses—Jurisdiction of Metropolitan Police Magistrate—"Court of Competent Jurisdiction"—Metropolis Management Amendment Act, 1890 (53 & 54 *Vict. c.* 66), *s.* 3.

A metropolitan police magistrate is a "Court of competent jurisdiction" within the meaning of s. 3 of the Metropolis Management Amendment Act, 1890, and has jurisdiction to entertain proceedings for the recovery from the frontagers of the expenses of repairs done by a borough council under the provisions of that section to a carriage road which is not repairable by the inhabitants at large.

ORDER nisi for a writ of prohibition directed to a metropolitan police magistrate and to the Wandsworth Borough Council to prohibit them from further proceeding in the matter of a claim by the council against one Ballard for payment by him of his apportioned share of the expenses of the repair of a certain carriage road which was not already a public road. The facts appearing in the affidavits were in substance as follows:—

There was a road called Fallsbrook Road, within the district of the Wandsworth Borough Council, the carriage way of which at the beginning of the year 1904 had become foundrous and insanitary. At that time there were on the north side of the road only the flanks of certain houses of which the frontages were in other streets, while, with the exception of four houses, the whole of the south side of the road was vacant. Under these circumstances the council considered that they were not justified in dealing with and paving the road as a "new street"; they accordingly decided to deal with it under the Metropolis Management Amendment Act, 1890, and passed a resolution "that the necessary works of repair be executed on the carriage way of that part of Fallsbrook Road which has not yet been adopted as a parish road at the cost of the owners of property abutting thereon under the provisions of the Metropolis Management Amendment Act, 1890." The work was duly executed and the amount of the expenses apportioned, the amount of Ballard's

C. A. 1907

REX v. GARRETT.

apportioned share being 239*l.* 7*s.* (1) The amount not having been paid when demanded, a summons was issued under s. 3 of the Act of 1890, at the instance of the Wandsworth Borough Council, calling upon Ballard to appear at the South Western Police Court to answer their claim for the apportioned share of the expenses. Upon the hearing of the summons, two points were raised on behalf of Ballard—first, that the works executed amounted to reconstruction, and not merely to necessary works of repair within the meaning of s. 3 of the Metropolis Management Amendment Act, 1890; and, secondly, that s. 3 did not authorize proceedings for the recovery of the apportioned share of the expenses to be taken in a Court of summary jurisdiction. The latter point was first argued, and, the magistrate having held that he had jurisdiction, the further hearing of the case was adjourned in order to enable Ballard to apply for a writ of prohibition. An application was accordingly made in the Divisional Court, but an order nisi was refused; subsequently, however, an application was made to the Court of Appeal, and an order nisi was granted.

Avory, *K.C.*, and *E. Morten*, for the Wandsworth Borough Council, shewed cause. The magistrate was right in holding that he had jurisdiction to hear the summons. A Court of summary jurisdiction is a Court of competent jurisdiction within the meaning of s. 3 of the Metropolis Management Amendment Act, 1890 (2); the meaning of the expression cannot be confined

(1) A previous apportionment had been set aside by the Divisional Court upon a special case, but it is unnecessary to further refer to it in this report.

(2) By 53 & 54 Vict. c. 66, s. 3: "Any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage road within their parish or district which shall have been used for not less than six months for public traffic and which may not at the time of such repair have become repairable by them, and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under the Metropolis Management Acts.

"The expenses of and incident to such repair may in the first instance be paid by the vestry or district board in the same manner as the expenses of repairing other streets repairable by them, and shall as soon as may be thereafter be apportioned upon and recovered from the owners of the houses and land

to the High Court or the county court. An examination of the earlier Acts shews that in the metropolis since 1855 paving expenses have always been recoverable before a police magistrate, and under the Act of 1890 the expenses of repair are made recoverable in the same manner as if they were paving expenses under the earlier Acts; they are therefore recoverable in any Court which is a Court of competent jurisdiction under those Acts. Under s. 105 of the Metropolis Management Act, 1855, no doubt paving expenses were constituted a debt, as the section itself provided no mode of recovery; but the effect of s. 225 was that the only remedy for their recovery was by summary proceedings under that section, because, the statute having provided a specific remedy for the enforcement of a pecuniary obligation created by it, no other remedy was applicable: *St. Pancras Vestry* v. *Batterbury*. (1) Under s. 77 of the Act of 1862 paving expenses were made recoverable from the owners of premises "either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board," and that enactment is still the law. The obvious meaning, therefore, of s. 3 of the Act of 1890 is that expenses of repairs under that section were to be recoverable just as if they were paving expenses and in the same Court. Further, by s. 9 of the Act of 1890 expenses are made recoverable in the same manner as penalties under the Act of 1855, and by s. 227 of the latter Act they are made recoverable by summary proceedings before a justice. The amount of the expenses and the necessity of the works are merely introduced as matters of prejudice, for they are questions to be decided by the borough council, and not by the magistrate: *Stroud* v. *Wandsworth District Board*. (2)

Danckwerts, K.C. (*H. Drysdale Woodcock* with him), in support of the rule. The effect of the provisions of s. 3 of the Act of

---

bounding or abutting on such road or part thereof in the same manner as if such expenses were expenses of paving such road or part thereof as a new street under the provisions of the Metropolis Management Acts relative thereto, and the amount of the expenses so apportioned may be recovered by the vestry or district board in a Court of competent jurisdiction."

(1) (1857) 2 C. B. (N.S.) 477.

(2) [1894] 2 Q. B. 1.

C. A. 1907

REX v. GARRETT

1890 as to the expenses of repairs carried out under that section is to create a specialty debt enforceable only in a civil Court. The power given by that Act to local authorities to repair roads which are not yet in a state to be paved and taken over by them is a new power; and where a new right is created and a specific remedy given in the same Act, only that remedy can be followed. No doubt under s. 77 of the Act of 1862 alternative modes of recovering paving expenses were given to the local authority, and if s. 3 of the Act of 1890 stopped at the words "relative thereto" the provisions of the earlier Act as to modes of recovery would probably have been incorporated, but the last sentence, providing for recovery "in a Court of competent jurisdiction," was inserted expressly to avoid that result. Before the Act of 1890 there was no such thing as a "Court of competent jurisdiction" in the proper sense of that term, though there was a choice of Courts given by s. 77 of the Act of 1862. "Competent" can only be understood as referring to the amount of the money claim which limits the jurisdiction or competency of the particular Court, and a Court of competent jurisdiction means a Court competent to entertain an action for the amount of the specialty debt sought to be recovered, that is, the High Court or the county court. The term "Court of competent jurisdiction" was intentionally introduced in order to prevent the local authority having the option of taking summary proceedings or bringing an action at law, because it was recognized that under cover of repairing a road a local authority might, as in the present case, take the opportunity of entirely renewing it, and it was desirable that the question of whether the repairs amounted to renewal should be submitted to a jury. The phrase "in the same manner as if such expenses were expenses of paving" must be read as having reference to the preliminary steps before taking proceedings for recovery, such as the determination of the persons liable to pay and the apportionment of the expenses amongst them. [He referred to *Shepherd* v. *Hills* (1); *Washer* v. *Elliott*. (2)]

COLLINS M.R. This is in substance an appeal from a decision of the Divisional Court refusing an order nisi for a prohibition

(1) (1855) 11 Ex. 55. (2) (1876) 1 C. P. D. 169.

directed to a metropolitan police magistrate to prevent him from entertaining a question as to the liability for repair of a road under s. 3 of the Metropolis Management Amendment Act, 1890. The argument in support is certainly very ingenious; but the case seems to me to be a simple one and to admit of no reasonable doubt.

The question turns upon the effect of s. 3 of the Act of 1890, which is in these words. [His Lordship read the section.] It has been explained to us that the object of that legislation was to confer upon the authority powers short of the obligation of paving—that is to say, that before they had made up their minds that it was desirable to turn a road into a new street they might do what they had not theretofore been able to do unless they were prepared to take that course, that is, execute certain repairs which would fall short of, or be inconsistent with, repairs amounting to paving; this enabled them to avoid incurring the expense of paving, which they must have incurred if they were prepared to make it into a new street. The local authority being enabled by the Act to repair without paving, provision had to be made for the way in which the expenses were to be apportioned, and also for their recovery. The machinery provided by the Act is analogous to the machinery in the case of paving expenses—that is to say, apportioning the cost and then securing its payment. The words of the section are, "and the amount of the expenses so apportioned may be recovered by the vestry or district board in a Court of competent jurisdiction." It is upon those words only that the argument arises; and it is said that the use of the words "a Court of competent jurisdiction" implies that there is a special provision made for recovery before a particular Court, and therefore to the exclusion of every other Court, and, that being so, whatever other Courts appear to be contemplated as the Courts to determine the rights in respect of paving expenses throughout the Act are excluded from the operation of the section by virtue of the fact that the jurisdiction has been conferred, and conferred exclusively, on a "Court of competent jurisdiction."

Unless there can be imported into the words "a Court of competent jurisdiction" the limitation contended for, that is, a

C. A. 1907

REX v. GARRETT.

Collins M.R

limitation to the High Court or the county court, the argument for the appellant does not arise at all, for it is only by attributing an exclusive force to the words "a Court of competent jurisdiction" that he can arrive at an exclusion of all other Courts which, but for the exclusive force of the words "a Court of competent jurisdiction," would be introduced by the other sections under which paving expenses are recovered. In my opinion the argument for the appellant breaks down, because it seems to me that the words "a Court of competent jurisdiction" were simply general words introduced in contemplation of the fact that the section does provide elsewhere for the mode of recovery, that is, in the same manner as paving expenses were recoverable under the earlier Acts, and the expression "Court of competent jurisdiction" seems to me to be only a compendious expression covering every possible Court which by enactment is made competent to entertain a claim for the recovery of paving expenses. It seems to me, therefore, that we are at liberty to look at the provisions made for the recovery of paving expenses in the Acts of 1855 and 1862.

We are asked by the appellant's counsel to say that the words "The expenses of and incident to such repair may in the first instance be paid by the vestry or district board in the same manner as the expenses of repairing other streets repairable by them, and shall as soon as may be thereafter be apportioned upon and recovered from the owners . . . . in the same manner as if such expenses were expenses of paving," are to be read as if they were limited to the initial processes of dealing with the matter of paving—that is to say, the determination of all conditions precedent affecting paving, apportioning the expense, and so on—and that they do not include the provision for recovery. If I appreciate his argument, that is the only way in which he can avoid the obvious meaning of the section, that the recovery of the repair expenses, as distinguished from paving expenses, is to be dealt with in the same way as paving expenses; and it is only by reading "in the same manner" in that limited fashion that he can raise the contention upon which his case rests. It seems to me that his argument breaks down when we follow out, as I propose to do, the actual statutory provisions for the repayment

of these expenses; it is not in the slightest degree inconsistent with those provisions to say that the Court in which paving expenses are recoverable is a Court of competent jurisdiction within the meaning of s. 3.

When we look to see what is the provision in this legislation for the recovery of paving expenses, we find first s. 105 of the Metropolis Management Act, 1855, which provides for the paving of a new street and for the apportionment of the expenses amongst the owners of houses forming the street. It will be noticed that that section does not contain an express provision as to how these expenses are to be recovered, for which we must look elsewhere.

I come next to s. 77 of the Act of 1862, because by the operation of that section the owners of land abutting, as distinguished from the owners of houses, are made liable for their proportion of the paving expenses. That section not only enlarges the sphere of liability by introducing the owners of land, but also provides for the method of recovering the expenses "by action at law or in a summary manner before a justice of the peace at the option of the vestry or board." It does not deal with the original liability created by the earlier section placed upon the heads of owners of houses.

I come now to a section which does provide a remedy in case there is not a specific remedy conferred in the earlier section, and that is s. 225 of the Act of 1855, which in such a case makes the "damage, costs or expenses" recoverable before two justices. The point arising on that section was not really argued before us, because it is covered by Mr. Danckwerts' main argument that there is no tribunal except a county court or the High Court.

I do not think that it is necessary to go further into what is a very plain matter, but there is a collateral line of sections which seem to lead to the same result. A point was made on s. 9 of the Act of 1890, which also deals with the recovery of penalties and expenses, and makes them recoverable in the same manner as penalties under the Metropolis Management Act, 1855, and the amending Acts. That covers not only penalties, but expenses; and therefore we look to see how penalties under the Metropolis Management Acts can be recovered, and we find in s. 227 of the

C. A. 1907

REX v. GARRETT.

Collins M.R.

Act of 1855 that every penalty imposed by that Act, the recovery of which is not otherwise provided for, may be recovered by summary proceedings before any justice in the manner provided by 11 & 12 Vict. c. 43. Therefore, by s. 9 of the Act of 1890, expenses and penalties under that Act are recoverable in the same way. The only other section which I need refer to is s. 104 of the Act of 1862. That is an amending section, and extends the provisions of s. 227 of the Act of 1855 for the recovery of penalties and forfeitures imposed by that Act to any damages, costs or expenses payable or recoverable under the recited Acts or the Act of 1862, and makes any such damages, costs or expenses, the recovery whereof is not otherwise provided for, recoverable by summary proceedings in manner directed by s. 227. It seems to me that there is a series of provisions which enable these expenses to be recovered before a magistrate, and that those provisions are not in any way inconsistent with, or cut down by, the general provision in s. 3 of the Act of 1890 that expenses shall be recovered in a Court of competent jurisdiction. In my opinion we have no alternative but to confirm the decision of the Divisional Court.

COZENS-HARDY L.J. I agree, and I have nothing to add.

FLETCHER MOULTON L.J. It is admitted that at the date of the Act of 1890 paving expenses could be recovered before a magistrate as well as in a Court of common law. The second paragraph of s. 3 of the Act of 1890 provides that repair expenses are to be apportioned among and recovered from the owners in the same manner as if they were paving expenses, and it goes on to say that they may be recovered in a Court of competent jurisdiction. I am of opinion that that means any Court competent to enforce the payment of paving expenses, with which these repair expenses have been assimilated. Mr. Danckwerts admits that if the last sentence of the paragraph were omitted—that is to say, the sentence that relates to their being recovered in a Court of competent jurisdiction—the same Courts that have jurisdiction over paving expenses would by the section have jurisdiction over repair expenses, but he suggests that the presence of this

provision that they may be recovered before a Court of competent jurisdiction negatives what goes before; in my opinion it emphasizes it. The words mean that any Court competent ad hoc, i.e., to enforce payment of paving expenses, shall be competent to enforce payment of repair expenses. Therefore this appeal must fail.

C. A. 1907

REX v. GARRETT.

Order nisi discharged.

Solicitors for applicant: *Bramall & White.*
Solicitors for respondents: *W. W. Young, Son & Ward.*

W. J. B.

BANK OF ENGLAND *v.* CUTLER.

1907

March 6, 7, 8, 15.

India Stock—Transfer in Books of Bank of England—Personation of Holder—Identification of Transferor by Stockbroker—Effect of Transfer—Estoppel—Obligation of Bank to replace Stock in name of true Holder—Liability of Stockbroker to indemnify Bank.

Under the statutes authorizing the issue of India Stock, transfers of that stock are invalid unless they are entered and registered in a book kept at the Bank of England for that purpose and are signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party desiring to transfer India Stock is the person entitled to it, it is the custom of the Bank to keep a list of stockbrokers whose identification of intending transferors will be accepted by them. The defendant was a stockbroker whose name was on that list. A woman fraudulently personated another who was a registered holder of India Stock, and, having procured herself to be introduced to the defendant as the holder, instructed him to prepare a transfer. The defendant accordingly sent to the Bank a "ticket"—that is, a statement of the names of the transferor and transferee, the nature of the stock, and the amount to be transferred—from which ticket the Bank prepared a transfer in the transfer-book, and the personator attended and forged the holder's name in the book, the defendant identifying her as being the holder. The stock was subsequently transferred to G., who purchased it bona fide and for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register, and the Bank in satisfaction of that claim purchased stock of a like amount and transferred it into her name. The Bank then sued the defendant as upon the breach of a warranty of the identity of the transferor:—

Held, (1.) that there was evidence upon which the Court could find, and that the proper inference of fact was, that the defendant requested the

1907

BANK OF ENGLAND v. CUTLER.

plaintiffs to permit the entry and registration of the forged transfer, a fact which, upon the authority of *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, involved the legal consequence that the defendant contracted to indemnify the plaintiffs against any liability resulting from the registration; (2.) that, as G. had purchased bona fide and for value upon the faith of the preceding transfer which the plaintiffs had permitted, the plaintiffs were estopped from treating the transfer to G. as a nullity and erasing his name from the register, and could only replace the original stockholder's name upon the register by purchasing other stock for the purpose, and that the defendant was consequently bound to make good to the plaintiffs the loss to which they had been put in so purchasing the stock.

TRIAL of action before A. T. Lawrence J. without a jury.

In October, 1903, a Miss Marian Pearson was the holder of 1544*l.* 15*s.* India 3½ per Cent. Stock, and was duly registered as holder in the book kept for that purpose at the Bank of England. The stock had been issued under 42 & 43 Vict. c. 60 and 43 Vict. c. 10. By s. 9 of the former Act it is provided that "In case of the creation and issue of any such capital stock there shall be kept, either at the office of the Secretary of State in Council in London or at the Bank of England, books wherein entries shall be made of the said capital stock, and wherein all assignments or transfers of the same, or any part thereof, shall be entered and registered, and shall be signed by the parties making such assignments or transfers, or, if such parties be absent, by his, her or their attorney or attornies thereunto lawfully authorized by writing under his, her or their hands and seals to be attested by two or more credible witnesses; and the person or persons to whom such transfer or transfers shall be made may respectively underwrite his, her or their acceptance thereof; and no other mode of assigning or transferring the said capital stock or any part thereof, or any interest therein, shall be good and available in law." And s. 7 of the later Act is in identical terms. For the purpose of enabling the Bank of England to be satisfied that the party desiring to transfer India Stock in their book is the person whose name appears in the book as being that of the party entitled to it, it has long been the custom of the Bank to require identification of intending transferors, and to keep a list of persons whose identification will be accepted by them, the list consisting of—(1.) certain stockbrokers; (2.) the clerks of such

1907

BANK OF ENGLAND v. CUTLER.

stockbrokers upon an undertaking by their masters to be answerable for their acts; (3.) certain high officials of the Bank of England; and (4.) past and present representatives of private banks. The defendant was a stockbroker whose name had for some years been upon the said list. In the month of October, 1903, one Annie Pearson, a half-sister of Marian Pearson, and a Mrs. Jeanie Pearson, a relative by marriage, conspired together to misappropriate Marian Pearson's India Stock. Having obtained possession of her stock receipt, which gave the particulars of the amount standing in her name, they went on October 9 to a solicitor of the name of Bartrum, Jeanie introducing herself as Marian Pearson, and instructed him to procure a transfer of the India Stock to one Abraham Loftus Tottenham, whose son Loftus Tottenham, it was alleged, was about to advance a sum of money to Marian Pearson. Loftus Tottenham had his father's authority to operate on his bank account, which was kept at Messrs. Coutts & Co. Mr. Bartrum, who had had previous business dealings with the defendant, sent his clerk, a Mr. Nuttall, with the two women to the defendant's office. Nuttall introduced Jeanie Pearson to the defendant as Marian Pearson the stockholder, and instructed him to prepare a transfer to Abraham Tottenham as upon a nominal consideration, the transfer being by way of security for a loan. The defendant accordingly prepared a document known as a "ticket," which was in the following form —

"This ticket is put forward by W. S. Cutler, stockbroker.
India 3*l.* 10*s.*
No. 1007.
Bank of England, the 9th day of October, 1903.
From
Miss Marian May Pearson,
of 5, Bridge Avenue, Hammersmith,
1544*l.* 15*s.* for 5*s.* India 3*l.* 10*s.* per Cent. Stock.
To
Abraham Loftus Tottenham,
of 15, York Place, W.,"

and sent it to the Bank with a notice that he would attend in the

1907

BANK OF ENGLAND v. CUTLER.

course of the afternoon and identify the transferor. From that ticket the transfer from Marian Pearson to Abraham Tottenham was prepared in the transfer-book of the Bank, and later in the day the defendant met the two women at the Bank, when the transfer was executed by Jeanie Pearson signing the name of Marian May Pearson in the book, the defendant signing his name in the margin of the transfer under the words "Witness to the identity of Marian May Pearson," and a new stock receipt was made out in the name of Abraham Tottenham. A "stock receipt" purports to be a receipt given by the transferor of inscribed stock to the transferee for the consideration money, in this case 5*s*., the transferor's signature to the receipt being witnessed by a clerk of the Bank. As the transfer took place after 1 o'clock, the Bank, in accordance with their custom, charged the defendant a "late fee" of 2*s*. 6*d*. On the same day the defendant sent to Mr. Bartrum his account, amounting to 1*l*. 3*s*. 6*d*., of which 2*s*. 6*d*. was for the late fee, and one guinea for the defendant's attendance at the Bank. Where brokers sell inscribed stock for a client they are remunerated for their trouble in identifying the transferor by getting the ordinary commission on sale. Where they identify a transferor upon a nominal consideration, if the amount transferred is under 2000*l*., they usually make the nominal charge of 1*l*. 1*s*., though where the amount transferred is larger they charge a higher fee. Where the amount transferred is over 2000*l*. it is usual for the Bank to make an independent inquiry as to the identity of the transferor, but where the amount is below that sum it is impracticable for the Bank to do so, and they made no such inquiry in the present case. Loftus Tottenham then applied to Messrs. Coutts & Co. to advance him a sum of 1200*l*. wherewith to make a loan to Jeanie Pearson, and Messrs. Coutts, who distrusted him, insisted before doing so on having the stock transferred to themselves and on having a letter from Marian Pearson authorizing that transfer. On October 16, 1903, Jeanie Pearson, writing in the name of Marian, consented to a transfer by Abraham Tottenham to Coutts & Co., and to his raising 1200*l*. upon it, and she agreed to Coutts & Co. selling the stock whenever they wished to repay themselves the advance. The stock was accordingly transferred to Coutts & Co.

1907

BANK OF ENGLAND v. CUTLER.

On June 5, 1904, Jeanie Pearson, still writing in Marian's name, requested Messrs. Coutts to sell the stock and pay themselves off. They accordingly sold the stock on the market to a Mr. Gibbs, into whose name it was transferred in the Bank's transfer-book. For two years after the date of the forged transfer Jeanie and Annie Pearson periodically paid to Marian Pearson the sums which would have been payable as the dividends of the stock, and thereby prevented her from suspecting the existence of the fraud. Towards the end of the year 1905 the forgery was discovered, and Annie and Jeanie Pearson were prosecuted and convicted. Marian Pearson then called upon the Bank to reinstate her upon the register, and the Bank purchased stock for that purpose at a cost of 1649*l.* 1*s.* 6*d.*, and paid her one dividend of 13*l.* 10*s.* 3*d.* which Jeanie and Annie Pearson had not paid her. The Bank then sued the defendant to recover the sum of 1662*l.* 11*s.* 9*d.* as damages for breach of an implied warranty that the person identified by the defendant was Marian May Pearson, in consequence of which they had been compelled to replace the stock in her name at the cost above mentioned. The defendant claimed an indemnity from Bartrum, whom he brought in as third party. At the trial Mr. Gibbs was not called as a witness. The issue between the defendant and the third party was not then tried, but the counsel for the third party were allowed to address the Court on the issue of the liability of the defendant to the plaintiffs.

Sir Robert Finlay, K.C., *Bankes, K.C.*, and *Rowlatt*, for the plaintiffs. The signature of the defendant in the margin of the transfer-book at the Bank operated as a warranty by him that the person executing the transfer was Marian Pearson the stockholder. The case is on all fours with that of *Starkey* v. *Bank of England* (1), where, a broker having innocently induced the Bank to transfer Consols to a purchaser upon a power of attorney, the stockholder's signature to which turned out to have been forged, it was held that he had impliedly warranted that he had the stockholder's authority, and that he was consequently liable to indemnify the Bank against the claim of the

(1) [1903] A. C. 114.

1907

BANK OF ENGLAND v. CUTLER.

stockholder for restitution. One who requests another to do an act which turns out to be wrongful is bound to indemnify the other against the consequences of doing it. On this ground it was held in *Sheffield Corporation* v. *Barclay* (1) that a transferee of the corporation's stock who lodged the transfer with the corporation for registration thereby impliedly contracted that the transfer was genuine. That case also covers the present, for no distinction can be drawn between an inducement of belief in the genuineness of the signature and an inducement of belief in the identity of the person signing. If a warranty is to be implied in the one case it must equally be implied in the other. And here the defendant did in substance request the Bank to register the transfer. He sent the ticket to the Bank with the intention that they should prepare the transfer in the transfer-book, and subsequently attended at the Bank and identified the party signing, knowing that without that identification the Bank would not permit the transfer to be completed. Those facts together amounted to a request. Under these circumstances the defendant is liable to indemnify the Bank against Marian Pearson's claim to be restored to the register, for Gibbs, having purchased the stock bona fide and for value, had a title to the stock which the Bank were estopped from disputing.

Danckwerts, K.C., and *Norman Craig*, for the defendant. In order to succeed the plaintiffs must make good two points—first, that the defendant warranted the identity of the person signing the transfer; and, secondly, that the plaintiffs acted upon that warranty to their detriment, and it is contended that they fail to establish either point. First, as to the alleged warranty. The cases cited are distinguishable on the ground that in both of them there was an express request to the plaintiffs to act. In *Starkey* v. *Bank of England* (2) the broker not only lodged the power of attorney at the Bank, but also signed the "demand to act" indorsed on the power. And in *Sheffield Corporation* v. *Barclay* (1) the defendants forwarded the forged transfer to the corporation with a request to register them as the transferees and to issue new certificates. In the present case there was no express request, and no request ought to be implied from the

(1) [1905] A. C. 392. (2) [1903] A. C. 114.

facts. If every statement upon which it is intended that another person shall act is to be treated as a request to act, then there is an end of *Derry* v. *Peek*. (1) All that a plaintiff who complained of misstatements in a prospectus would have to allege would be that the defendants issued the prospectus and thereby requested the plaintiff to act upon it by applying for an allotment of shares, and that he did so act upon it to his damage; and proof of fraud would be unnecessary. Yet there is just as much justification for inferring a request in such a case as in the present. The position of the defendant here is that of a witness, and nothing more. The Bank do not act at the identifying broker's instance, for they are not entitled to require identification at all. They are no doubt entitled to a reasonable time after notice of a proposed transfer within which to satisfy themselves as to the identity of the proposed transferor, but after the expiry of that time they would be bound to permit the transfer whether the transferor was identified or not. The identifying broker is merely one of a class of persons, limited by the Bank themselves, whose evidence the Bank are willing to accept to satisfy their own minds as to the transferor's identity. The broker does not purport to act as the agent of the transferor, at all events in a case in which, as here, the consideration for the transfer is nominal, so that he gets no brokerage commission. In such a case he is no more the agent of the transferor than a person giving a character to a servant is the servant's agent, or than an ordinary witness in Court is the agent of the party calling him. The fact that the transferor pays him a small identification fee for the trouble of attending at the Bank makes no difference. A witness is entitled to be paid his expenses, and time was when judges were paid by fees, but no one would suggest that that fact made them the agents of the suitors. If the broker, in witnessing the identity of the transferor, is acting in anybody's interest, it is in that of the Bank rather than that of the transferor. He may be regarded in one sense as acting for the Bank, but, as he is unpaid so far as they are concerned, his only duty towards them is to be honest. The highest that the case can be put against him is that he undertakes that he reasonably

(1) (1889) 14 App. Cas. 337.

1907

BANK OF ENGLAND v. CUTLER.

believes in the transferor's identity. He does not warrant it. And there is no suggestion here that the defendant's belief was unreasonable.

Secondly, even if the defendant did undertake to indemnify the plaintiffs against loss, the plaintiffs have suffered no damage. The transfer which purported to be by Marian Pearson was a nullity. No title can be obtained through a forgery. The proper course for the Bank on discovery of the fraud was to strike the transfer out of the book, replacing Miss Pearson's name as the holder of that identical stock, and erasing the name of Mr. Gibbs the transferee. In *Davis* v. *Bank of England* (1) it was held that property in stock is not transferred from the owner by being placed under a forged power of attorney to the name of another person in the books of the Bank of England. There the plaintiff complained, in counts 1 and 3 of his declaration, that two parcels of Government stock to which he was entitled had by the defendants' permission been wrongfully transferred out of his name, whereby he had lost the stock, and in counts 2 and 4 that the defendants refused to pay him the dividends due on the said stock. He was held entitled to recover the dividends, but not damages for the loss of the stock, because he had never lost it. Best C.J., delivering the judgment of the Court, said: "The first question we are to decide is, Have the stocks which stood in the plaintiff's name in the books of the bank been transferred out of that name? We think that the plaintiff's property in the funds has not been transferred; that he is still the legal holder of these funds and entitled to the dividends payable on account of them. He cannot, therefore, have a verdict on the first or third counts." In other words, the forged transfer was simply inoperative, it effected nothing. The decision in that case that the plaintiff was entitled to recover the back dividends was afterwards reversed in error (2), upon the ground that there was no allegation or finding that the Bank had ever received from the Government the money out of which to pay them. But that reversal does not in any way affect the authority of the judgment of the Common Pleas upon the point for which it is now cited.

(1) (1824) 2 Bing. 393. (2) (1826) 5 B. & C. 185.

Here, then, the liability of the Bank, if any, was not to Marian Pearson, but to the subsequent transferees, and that could only be by estoppel. Then were the Bank estopped from disputing the title of either of those transferees, Messrs. Coutts or Mr. Gibbs? In order to give rise to an estoppel in their favour it must be shewn that the Bank made a representation that the forged transfer was valid with the intent that the transferees should act upon it, and that the transferees, believing it to be true, acted upon it to their damage: see *Carr* v. *London & North Western Ry. Co.* (1) With regard to Messrs. Coutts, the evidence went to shew that they did not rely on the transfer, they distrusted Tottenham; and before they advanced the money they got the authority of the person they supposed to be Marian Pearson to transfer the stock into their own name. But even supposing that they did rely on the forged transfer, so that there was an estoppel in their favour at one time, that estoppel ceased the moment they transferred the stock to Gibbs and paid themselves off; for at no subsequent point of time could they have alleged that the Bank were precluded from disputing that their names were then properly on the register: *Simm* v. *Anglo-American Telegraph Co.* (2) Then was there any estoppel in favour of Gibbs? There was no evidence that he relied on the genuineness of the preceding transfers or on any implied representation by the Bank that Messrs. Coutts were entitled to the stock. He was never called as a witness, and there is no presumption of law that he acted upon the faith of the transfers. Presumably he was content to rely on the commercial position and credit of his vendors, knowing that if it turned out that there was anything wrong about the title to the stock his vendors would make good the loss. If, then, Gibbs had no title by estoppel, there was no obligation upon the Bank to purchase any stock to be replaced in Gibbs' name after the forged and subsequent transfers had been erased from the transfer-book. The purchase of stock which they made was purely voluntary, and there was consequently no loss against which the defendant could be called upon to indemnify them.

Tindal Atkinson, K.C., and *Marriott*, for the third party.

(1) (1875) L. R. 10 C. P. 307, at p. 317. (2) (1879) 5 Q. B. D. 188.

1907

BANK OF ENGLAND v. CUTLER.

The duty of an identifying broker cannot, in any event, be put higher than a duty to take care. The Bank know perfectly well that there are many cases in which the transferor is a stranger to the broker, and in which, consequently, the broker must act upon the information of others. The identification cannot be treated as a representation of personal knowledge; and the presumption is that a man never intends to warrant that which he does not believe himself to know. Nor can any such warranty be inferred from the sending in of the ticket. *Starkey's Case* (1) has no bearing on this point. All that that case decided was that a broker who presents a forged power of attorney to the Bank, and thereby represents that he is the authorized agent of the stockholder, is bound to make his representation good. But a broker in sending in a ticket does not purport to act as the agent of the stockholder. It was not a representation that the defendant had Marian Pearson's authority to instruct the Bank to act; it was a mere description of the parties.

With regard to the other point that the Bank have suffered no loss to be indemnified against, the claim of the Bank, as has already been pointed out, is misconceived, being founded on a supposed liability to the true owner of the stock. The case of *Sloman* v. *Bank of England* (2) may be relied on by the plaintiffs as an authority that their liability was to Marian Pearson, and that as they could not consistently with recognition of Gibbs' title replace her name on the register without buying fresh stock for the purpose, the amount of the stock issuable being limited, they were compelled to purchase the stock which they did. The form of the order in that case was "that the Bank do forthwith replace the sum of 6250*l.* three and a half per cents. in the name of" the original stockholder. But all that was there meant was that the stockholder was entitled to a declaration that he was still a stockholder. In the words of the Vice-Chancellor, Sir Launcelot Shadwell, the Bank were bound to "make the account stand as it ought to have stood." It is true that in *Starkey* v. *Bank of England* (1) the decision proceeded upon the assumption that the liability of the Bank was to the original stockholder, whose name

(1) [1903] A. C. 114. (2) (1845) 14 Sim. 475.

was forged, the claim against the third party being for an order to indemnify the Bank against liability to make restitution to the stockholder. But the present point was never raised or discussed there in any way; it was lost sight of.

In the present case the only liability of the Bank, if any, was to Gibbs. But no claim has been made by Gibbs; therefore, unless the statement of claim is amended, the action must fail. But assume that it is amended, still the action will not lie. For Gibbs' title could only be based on estoppel, and here there was no estoppel. It has already been urged on behalf of the defendant that, assuming that the Bank had made a representation which, if acted upon by Gibbs, would have founded an estoppel, there is no evidence that Gibbs ever so acted. But there is a further ground for holding that there was no estoppel here. The Bank never made any such representation. There was no duty imposed upon the Bank by the statute towards intending transferees. Their only duty was to keep the book and register in it all valid transfers. They were bound not to exclude the names of the true owners of the stock. But their duty was to the stockholders alone. There was no duty to guarantee to strangers the accuracy of the book. No doubt in *Davis* v. *Bank of England* (1) Best C.J. did suggest that the duty was one owed to the public generally, and that the Bank would be estopped from disputing the title of a bona fide purchaser. But that was only an obiter dictum which was unnecessary to the decision. It seems clear that in the case of joint stock companies the only duty on the company in respect of the register is to the stockholders, and there is none to their transferees: *Simm* v. *Anglo-American Telegraph Co.* (2) And the same has been held in the case of municipal corporation stock. In *Sheffield Corporation* v. *Barclay* (3) Lord Davey said: "I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who

(1) 2 Bing. 393, at p. 407.
(2) 5 Q. B. D. 188, per Bramwell L.J. at p. 203; per Cotton L.J. at p. 214.
(3) [1905] A. C. 392, at p. 403.

1907

BANK OF ENGLAND v. CUTLER.

are on the register." But what is true of joint stock companies' stock and municipal corporation stock must equally be true of inscribed Government stock. The transferees of such stock have no right to rely upon the register, and cannot be heard to complain if it is inaccurately kept. No doubt in the case of joint stock companies' stock and municipal corporation stock an estoppel does arise, if and when a certificate is issued, in favour of a transferee who parts with his money on the faith of the certificate: *In re Bahia and San Francisco Ry. Co.* (1) But in the case of India Stock no certificate is ever issued. Therefore there can be no estoppel. It is true that in *Starkey's Case* (2) it was assumed that there was an estoppel in favour of the transferees, for otherwise there was no loss against which the Bank required indemnity, and the stock in that case was Consols, in respect of which, as in the case of India Stock, no certificate is issued. But the point now contended for was never raised, and, as it was presumably not present to the minds of the Law Lords, their decision cannot be regarded as an authority to the contrary. In *Simm* v. *Anglo-American Telegraph Co.* (3), where it was held that the issue by the company of a certificate to the transferees under a forged transfer created no estoppel in their favour, one of the grounds of the decision was that the fact of the transfer being forged was a matter "which lay as much within the knowledge of Burge & Co.," the transferees, "as within that of the company." That applies with equal force to a forged transfer of India Stock. The Bank of England has no superior means of knowledge of the identity of the transferor.

Bankes, K.C., in reply. Upon the question whether on the assumption that there was a warranty of the transferor's identity the Bank had suffered a loss as the result of a breach of that warranty, it is contended that the Bank were bound to reinstate Miss Pearson; and that under the circumstances they could not do so without loss to themselves. *Davis* v. *Bank of England* (4) is a clear authority for the first proposition. The Court there held that the stockholder had not by the forged transfer lost his title to the stock, and therefore they could not give him damages

(1) (1868) L. R. 3 Q. B. 584.
(2) [1903] A. C. 114.
(3) 5 Q. B. D. at p. 209.
(4) 2 Bing. 393.

under the first and third counts for a loss which he had not suffered. They did not, however, order his name to be restored to the register, for that was a matter which was outside the jurisdiction of a Court of common law at that date. An order to replace the stock could only be made in a Court of Equity. And that was what was done by the Vice-Chancellor in *Sloman's Case*. (1) Now the only possible way in which the Bank could reinstate Miss Pearson was to purchase the amount of the stock and transfer it into her name. They could not lawfully issue fresh stock for the purpose, nor could they, as suggested by the defendant, strike the name of the ultimate transferee, Gibbs, out of the register. Stock, unlike shares, is not identifiable. If 100*l.* of stock is transferred to a person who already holds another parcel of the same stock the two parcels become merged. And if the transferee subsequently transfers to a third person 100*l.* of that stock, it is impossible to say whether that 100*l.* is the identical 100*l.* which was so transferred to him or a part of what he held before. In the case of shares you can follow them through any number of transfers, because the shares are numbered, and if the initial transfer is forged the names of all the successive transferees can be struck out of the register, though possibly there may be a liability on the company by way of estoppel to pay damages to the ultimate transferee whose name is on the books as holder. But in the case of stock no one can take upon himself to say that the stock standing in the name of the ultimate transferee is the identical stock that was the subject of the forged transfer. "Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further, than the Bank books for the title of the person who proposes to transfer to you": per Best C.J., *Davis* v. *Bank of England*. (2) In *Barton* v. *North Staffordshire Ry. Co.* (3) the plaintiff, a stockholder, out of whose name stock of the defendant

(1) (1845) 14 Sim. 475. (2) 2 Bing. 393, at p. 408.
(3) (1888) 38 Ch. D. 458.

1907

BANK OF ENGLAND v. CUTLER.

company had been transferred under a forged transfer, claimed that the company might be ordered to appropriate or purchase and to transfer to and register in his name stock of the like amount, and the order was so made. In *Starkey's Case* (1) also the Bank were ordered to place equivalent amounts of stock in the name of Oliver, the original holder, and Starkey, the broker, who lodged the forged power with the defendants, was ordered to indemnify them. In that case the Bank had to buy stock to replace what had been transferred, and Starkey had to pay the price of the stock so bought. With regard to the contention of the defendant that the Bank register created no estoppel in favour of the transferees, the case of *Simm* v. *Anglo-American Telegraph Co.* (2), which was relied upon in support of that proposition, is not in point. There is a broad distinction between the registration of a transfer of stock of a joint stock company and that of a transfer of India Stock. In the case of the former the transfer is executed independently of the company, and without their knowledge or assent, and when the transferee, who has in the meantime parted with his money upon the faith of the validity of the transfer, brings it to them for registration, the company, in registering it, perform a mere ministerial act at his request. In the case of India Stock the execution of the transfer and its registration are one and the same act. The Bank are parties to it. And it is when the Bank have so registered it, and not until they have done so, that the transferee's broker parts with the purchase-money. The registration of a holder of India Stock in the Bank's transfer-book is equivalent to a certificate. It conveys the same representation that the certificate does in the case of a joint stock company. Under those circumstances the Bank must know that the transferee relies upon their implied representation that the transferor had a good title to the stock. It was consequently unnecessary to call Gibbs as a witness.

The question whether the defendant's conduct amounted to a request to the Bank to act is a question of fact. There is evidence upon which the Court may infer that the defendant did make such a request, and that he was not a mere witness. It was to the defendant's interest that the transaction should be

(1) [1903] A. C. 114. (2) 5 Q. B. D. 188.

completed. Brokers, although not directly paid by the Bank for so doing, make a practice of identifying transferors as a matter of business, and receive a consideration for it in the shape of the business connection which they derive from the fact of their being on the privileged list. Moreover, the fact that they exact a higher fee from the transferor when the amount exceeds 2000*l.* shews that they appreciate that they run a risk in identifying him. There is, therefore, no hardship in holding that the identifying broker requests the Bank to permit the transfer. And if the Court finds that the defendant here did make such a request, it follows as matter of law, from the decision of the House of Lords in *Sheffield Corporation* v. *Barclay* (1), that he warranted the transferor's identity, and is bound to indemnify the plaintiffs for the consequences of his mistake.

Cur. adv. vult.

March 15. A. T. LAWRENCE J. read the following judgment:— This action arises out of a fraud perpetrated in October, 1903, upon Miss Marian May Pearson, an unmarried lady living at Bridge Avenue, Hammersmith, by her half-sister, Annie Pearson, and a connection by marriage, one Jeanie Pearson.

Miss Pearson was the owner, duly inscribed in the books of the Bank of England, of India 3½ per cent. Stock to the amount of 1544*l.* 15*s.* The two women above-mentioned obtained possession of the stock receipt for this amount of stock. They desired to borrow money, and, in order to do so, Jeanie personated Miss Pearson and forged her name to a transfer in the Bank books. They contrived to conceal these facts by paying Miss Pearson the dividends until 1905, when the fraud was discovered and they were prosecuted. They were convicted of forgery at the Old Bailey on January 1, 1906.

In this transaction the defendant acted as witness to the identity of Marian May Pearson. He did not know Miss Pearson, and he was deceived when he identified Jeanie Pearson as Marian May Pearson. The plaintiffs bring this action against the defendant in respect of his acts in the matter. The defendant's good faith is admitted. That he would not be

(1) [1905] A. C. 392.

1907

BANK OF ENGLAND v. CUTLER.

A. T. Lawrence J.

liable for a mere innocent misstatement of fact is also admitted. But the plaintiffs say that the facts of the case bring him within the principle of liability established by *Collen* v. *Wright* (1) and many other cases. The statement of claim is framed upon an implied warranty and promise of indemnity.

It becomes necessary to state the facts. The India Stock in question was issued pursuant to the statutes 42 & 43 Vict. c. 60 and 43 Vict. c. 10. By these statutes books are required to be kept at the Bank of England, wherein entries of the stock issued are to be made, and all transfers and assignments are to be executed by the stockholders, no other mode of transfer or assignment being good or available in law. It is the long-established practice of the Bank of England to permit stockholders to make transfers in the Bank books only when they are identified by persons of one of three classes—(1.) certain high officials of the Bank of England, (2.) the past and present representatives of private banks, (3.) members of the London Stock Exchange and their clerks whose names are upon a list kept at the Bank. The privilege of being on this list of brokers is obtained by the introduction of a member already upon the list. A member upon the list can have his clerk's name put upon it by signing a document making himself responsible for the acts of his clerk. There are some 3000 members on this list, and it is clearly a privilege valuable to brokers who deal in Government securities. The defendant's name was upon this list. On October 9, 1903, Mr. Nuttall, the managing clerk of Mr. J. A. Bartrum, a solicitor who had acted as solicitor for the defendant, waited upon him at his office and instructed the defendant to prepare a transfer of this stock and to put forward a "ticket." The necessary particulars were furnished to the defendant, and it was explained to him that the commission was 5*s*., as it was for the purpose of a loan of 1200*l*. by one Tottenham to Miss Pearson. The defendant took it for granted that the woman Jeanie who was introduced to him as Miss Marian May Pearson was, in fact, that lady. He accordingly gave his clerk instructions to prepare the necessary ticket and stock receipt, and sent him to the Bank with the ticket, saying that he would attend later in the day and carry

(1) (1857) 8 E. & B. 647.

through the transfer. This ticket which was "put forward" by the defendant gives the particulars necessary for the preparation by the Bank officials of the transfer in the books. As it was after one o'clock in the day the payment of a fee of 2*s.* 6*d.* was necessary if the matter was to proceed forthwith. The clerk paid the fee, had the ticket stamped "fee paid," and then took the ticket so marked to the transfer department. Later in the day the defendant attended at the transfer department with the women, and carried out the transfer in the ordinary formal manner, except that the transfer in the transfer book, inscribed in accordance with the instructions contained in the ticket, was executed by Jeanie forging the name of Marian May Pearson. The usual stock receipt was also signed, was witnessed by the Bank official, and was handed by the defendant to the solicitor. The defendant subsequently sent in his account to the solicitor, and was paid his charges, which he fixed at 1*l.* 3*s.* 6*d.*

The stock receipt shewed a transfer of the stock to Abraham Loftus Tottenham in consideration of 5*s.* Abraham Loftus Tottenham had an account at Messrs. Coutts' Bank, which account was operated upon by his son Loftus. Loftus had arranged to make a loan to the women, and had applied to the Messrs. Coutts for an advance for the purpose. They declined to make any advance unless upon security duly vested in them. This stock was accordingly, on October 19, 1903, transferred by Abraham L. Tottenham in the Bank books to Messrs. Coutts & Co., and advances were then made against it. Subsequently the stock was sold by Messrs. Coutts on the Stock Exchange to Mr. William Gibbs, a jobber and member of the Stock Exchange, and on June 17, 1904, was transferred to him in the books of the Bank. The price was duly accounted for by Coutts & Co. to Tottenham.

In 1905 Miss Marian May Pearson discovered that Annie and Jeanie Pearson had committed other frauds upon her, and upon investigation discovered this transaction. She then called upon the Bank to replace the stock. The Bank being advised that they were liable, bought stock upon the market at the price of 1649*l.* 1*s.* 6*d.*, and paid her one dividend of 13*l.* 10*s.* 3*d.* which she had not received from the forgers. The stock so bought was

1907

BANK OF ENGLAND v. CUTLER.

A. T. Lawrence J.

duly transferred in the books of the Bank to Miss Marian May Pearson. The Bank then brought this action against the defendant, claiming the total sum of 1662*l.* 11*s.* 9*d.*

Did, then, the defendant request or direct the plaintiffs to permit the transfer of this stock to be made? If he did he comes within the well-established doctrine expressed by Lord Davey in *Sheffield Corporation* v. *Barclay* (1), in these words: "Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty." The Bank does nothing with regard to the transfer of stock until set in motion by some one. Its only duty is to permit a transfer to be made at the request or by the direction of the stockholder. It then prepares the transfer in the transfer books without charge. The stockholder can make the request either personally or by agent, and either expressly or impliedly. Did the defendant make it here and represent that he made it on behalf of the true stockholder? He says himself that he was instructed to prepare a transfer and put a ticket forward. I think the drawing up of this ticket, the taking it to the Bank, the payment of 2*s.* 6*d.* to get the transfer expedited and made ready on the same day, the attendance at the Bank with the proposed transferor and the identification of the forger as the stockholder, constitute when taken together as distinct a request to permit the transfer to be made in the books as the "demand to act" under the power of attorney did in the case of *Starkey* v. *Bank of England.* (2) He said in evidence that his part of the transaction was "simply putting it through the Bank." I come, therefore, to the conclusion as a matter of fact that the defendant did request the Bank to permit Marian May Pearson to make this

(1) [1905] A. C. at p. 399. (2) [1903] A. C. 114.

transfer, and did identify this woman Jeanie as Marian May Pearson, the true owner of the stock. The legal effect of this was to warrant that she was Marian May Pearson, and promise to indemnify the Bank if she was not. I see no essential distinction between this case and that of *Starkey* v. *Bank of England* (1) or *Sheffield Corporation* v. *Barclay*. (2) What was warranted in those cases was authority, but authority is involved in identity. The latter contains the former. A false warranty of identity involves a false warranty of authority, and the effect is precisely the same. It was argued for the defendant that he was a representative of the Bank deputed to form a judgment as to the identity of the stockholder and that he could not be required to do more than exercise reasonable care. I have not to decide whether as between the Bank and a stockholder the Bank is entitled to insist upon evidence of identity being furnished by persons of a particular class. Here the Bank made no inquiry of or request to the defendant, and I cannot hold that because the defendant was one of a limited class of persons whose identification the Bank was willing to accept without further inquiry, that made him the representative or agent of the Bank. The defendant was in fact the agent for reward of the supposed transferor. It was further urged that the transfer being forged was a nullity, and that no damage had been sustained by the Bank, because it was not shewn that anyone had acted in reliance upon this transfer. This argument was founded upon some answers in cross-examination of Mr. Covington, a gentleman in the loan department of Messrs. Coutts. He admitted that he did not trust Loftus Tottenham, and always had doubts about this transaction. It was clear to me that what he meant was distrust of Loftus Tottenham personally, and not of this transfer. He had insisted upon having the stock transferred so as to have the legal title in the Bank before making the advance, and as it was transferred to Tottenham for a nominal commission he was anxious that Loftus Tottenham should not deprive the supposed transferor of her beneficial interest. To this end he frequently communicated with her and obtained her written authority for dealing with the stock. He did not say,

(1) [1903] A. C. 114. (2) [1905] A. C. 392.

1907

BANK OF ENGLAND v. CUTLER.

A. T. Lawrence J.

and I see no ground for supposing, that he did not rely in making the advances entirely upon the genuine character of this supposed transfer. I am convinced that he did. He supposed, of course, that the transferor and the person with whom he was communicating was the genuine Miss Pearson. In fact it was in both cases the forger Jeanie.

It was next urged that upon the pleadings and particulars no damage was shewn to the plaintiffs because no facts to raise an estoppel were alleged therein, and no opportunity except by cross-examination at this trial had been afforded to the defendant of investigating the bona fides of the subsequent transactions. This argument was founded upon the alleged effect of the judgment in *Davis* v. *Bank of England.* (1) It was said that the transfer being forged was a nullity, that neither Gibbs nor Coutts nor Tottenham have made any claim upon the Bank, and that, therefore, when the Bank bought stock for Miss Pearson they made a voluntary expenditure, for they could, it was said, have replaced her name in the books without doing so. I think this argument erroneous and the pleadings sufficient. If I had not done so I should have given leave to amend, and made any reasonable adjournment the defendants might ask. The decision in *Davis's Case* (1) upon counts 1 and 3 went upon the fact that neither the pleadings nor the verdict alleged any refusal on the part of the Bank to replace the stock. When the forged transfer is said to be a nullity that merely means that it had no effect upon the stockholder's property; her title to 1544*l.* 15*s.* worth of stock remained intact. But the subsequent transfers cannot be struck out of the Bank books except as the result of an action wherein the transferees have been shewn to be affected by complicity in the fraud. Prima facie a transfer which the Bank has permitted is valid, and if acted upon bona fide and for value the Bank is estopped as well from touching it as from saying that it is invalid. Therefore when in October, 1903, Messrs. Coutts & Co. made advances bona fide upon the faith of this transfer, as I am satisfied they did, there was a complete and binding estoppel against the Bank. To then reinstate Miss Pearson's name in the books would be ultra vires

(1) 2 Bing. 393.

of the Bank, for it would place on the books more stock than was authorized by the Act of Parliament, or, if there was stock still unissued, would be a flagrant breach of duty, for it would be an attempt to pledge the credit of the country for a sum that had not reached and could not reach the Treasury. All the Bank could do when called upon by Miss Pearson in December, 1905, was to replace this amount of stock in her name by purchasing it and conveying it to her. There is no identity in stock, and when this has been done her property in law and her apparent title upon the books would once more accord.

I think this view is shewn to be covered by the judgment of Shadwell V.-C. in *Sloman* v. *Bank of England*. (1)

There must be judgment for the plaintiffs for the amount claimed with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Freshfields.*

Solicitors for defendants: *Christopher & Roney.*

(1) 14 Sim. 475.

J. F. C.

C. A.
1907
March 18.

[IN THE COURT OF APPEAL.]

MAYOR, &c., OF WESTMINSTER *v.* GORDON HOTELS, LIMITED.

Metropolis Management Acts—Removal of Refuse—Hotel—Trade Refuse—Dispute between Occupier and Sanitary Authority—Decision of Petty Sessional Court "shall be final"—Appeal by Special Case—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 33, *sub-s.* 2.

In any dispute between the occupier and the sanitary authority as to what is to be considered trade refuse, the decision of the magistrate under s. 33, sub-s. 2, of the Public Health (London) Act, 1891, is final, and no appeal will lie to the High Court, notwithstanding the general provisions of the Summary Jurisdiction Act, 1879, s. 33, giving any person aggrieved by a decision of the magistrate on a question of law the right to require a case to be stated for the opinion of the High Court.

Reg. v. *Bridge*, (1890) 24 Q. B. D. 609, distinguished.

Per Buckley L.J.: Whether in this case it is still competent for a magistrate to give his decision subject to a case for the opinion of the High Court, *quære?*

Appeal from the decision of a Divisional Court. (1)

The question for the decision of the Divisional Court was raised by a case stated by one of the magistrates of the Bow Street Police Court, the point being whether the ordinary refuse of an hotel was "house refuse" within the meaning of s. 30 of the Public Health (London) Act, 1891, which the Westminster Corporation, as the sanitary authority, was bound to remove without payment, or "trade refuse," for the removal of which, under s. 33, sub-s. 1, the occupier would be required to pay.

In April, 1905, a summons had been taken out by the hotel company against the sanitary authority under s. 30 of the Public Health (London) Act, 1891, for failing to remove the house refuse at the Hotel Metropole; and a cross-summons had been issued at the instance of the sanitary authority against the hotel company to answer a complaint that a dispute or difference of opinion within the meaning of s. 33, sub-s. 2, of the Public Health (London) Act, 1891, had arisen between the owners and occupiers of the Hotel Metropole and the corporation, as the

(1) [1906] 2 K. B. 39.

sanitary authority, as to what was to be considered as trade refuse.

The magistrate decided that the refuse in question was "house refuse" which the sanitary authority had failed to remove without reasonable cause, and he convicted and fined them under s. 30, sub-s. 2. On the cross-summons he decided that the subject-matter of dispute was not trade refuse; the sanitary authority being dissatisfied with this decision as being erroneous in point of law, applied for a special case, and a case was accordingly stated for the opinion of the Divisional Court.

The Divisional Court (consisting of Lord Alverstone C.J., Darling and Bray JJ.) affirmed the finding of the magistrate, but gave leave to appeal on the cross-summons, in order that this question might receive the further consideration of the Court of Appeal.

The appeal was called on on March 18.

Danckwerts, K.C., and *R. C. Glen*, for the respondents, took the preliminary objection that no appeal would lie either to the Divisional Court or the Appeal Court under the express words of s. 33, sub-s. 2 (1). The wording of s. 33, sub-s. 2, is clear and precise that the decision of the magistrate on this question "shall be final": there was therefore no right of appeal even to a Divisional Court, and the Divisional Court consequently could not give leave to appeal under the Judicature Act, 1894, s. 1, sub-s. 5, for it never had any jurisdiction over this matter. A similar question was raised under s. 129 of the Metropolis Management Act, 1855, in *Reg.* v. *Bridge* (2), where the words of s. 129 are much the same as the words of s. 33, sub-s. 2, in the Act of 1891, and it was only by the operation of the subsequent general Act of 1879—the Summary Jurisdiction Act, 1879, s. 33—that the Court held that a case could be stated. In the present case, notwithstanding the existence of a general Act like the Summary Jurisdiction Act, 1879,

(1) Sect. 33, sub-s. 2, provides: "If any dispute or difference of opinion arises between the owner or occupier and the sanitary authority as to what is to be considered as trade refuse, a petty sessional Court, on complaint made by either party, may by order determine whether the subject-matter of dispute is or is not trade refuse, and the decision of that Court shall be final."

(2) 24 Q. B. D. 609.

C. A. 1907

WEST-MINSTER CORPORATION v. GORDON HOTELS, LIMITED.

giving leave to the magistrates to state a case, the Legislature in 1891 in clear words provides that in this particular case there shall be no appeal. An appeal is provided in some cases by s. 125 of the Act of 1891 to quarter sessions, but in cases under s. 33, sub-s. 2, the decision of the magistrate is to be final. A similar question arose in *Reg.* v. *Hunt* (1) under 7 & 8 Vict. c. 101, where s. 39 makes the decision of the auditor "final" on a bill of costs in certain cases, and the Court held that the words were too clear and too strong for them to allow an appeal by certiorari. A new code is introduced by s. 33, sub-s. 2, which imposes on the magistrate the statutory duty of deciding whether refuse is "trade refuse" or not, and the statute provides that this decision, whether on law or fact, is to be final.

Macmorran, K.C., and *Courthope Munroe*, for the appellants. The statement of a case by a magistrate for the opinion of the High Court is not really "an appeal." The Summary Jurisdiction Act, 1879, is a general Act, relating to procedure, and the generality of this Act is not overridden by the particularity of this later enactment, which makes no reference to the Act of 1879. So that really *Reg.* v. *Bridge* (2) is in favour of the appellants; s. 33, sub-s. 2, does not in terms take away the general right given by s. 33 of the Summary Jurisdiction Act, 1879, to have a case stated. The Public Health (London) Act, 1891, is only a consolidating and amending Act; it does not in terms take away the right to have a case stated which existed at the date it was passed. In *Vestry of St. Martin's* v. *Gordon* (3) Lindley L.J. states that the decision of the magistrate on the question of trade refuse under s. 129 of the Metropolis Management Act, 1855, can be reviewed under the Summary Jurisdiction Act on a case stated. An analogous case was raised under the Police Act, 1890, in *Goodwin* v. *Sheffield Corporation* (4), where s. 11 provides that the decision of quarter sessions is to be final, and yet the Divisional Court decided that that did not deprive a party of his right to have a case stated upon a question of law, and that the case was within the principle of *Reg.* v. *Bridge*. (2) No intention is shewn in the Act of 1891 to shut out

(1) (1856) 6 E. & B. 408.
(2) 24 Q. B. D. 609.
(3) [1891] 1 Q. B. 61, at p. 68.
(4) [1902] 1 K. B. 629.

or alter this general right to have a case stated. The cross-summons was issued solely with a view of bringing the case, by leave, before the Court of Appeal.

Danckwerts, K.C., in reply. The Legislature by this Act of 1891 deliberately restored the state of things upset by the decision of *Reg.* v. *Bridge* (1), and set up a cheap and simple method of deciding questions of this kind.

COZENS-HARDY M.R. In this case a preliminary objection has been taken on behalf of the respondents by Mr. Danckwerts that no appeal lies to this Court, or indeed to the Divisional Court, by reason of the provisions in s. 33, sub-s. 2, of the Public Health (London) Act, 1891. [After stating the facts his Lordship continued :—]

Under these circumstances the question for our decision now is whether any appeal lies. After some hesitation I have come to the conclusion that no appeal lies, and that this preliminary objection must prevail. The language of s. 33, sub-s. 2, is so strong that I do not see my way to get out of it. I will read it. [Having read the sub-section his Lordship continued :—] It is scarcely possible to imagine words more strong, or which apparently more completely negative the right of any tribunal to review a decision of the magistrate.

But it is argued by Mr. Macmorran that we are in fact bound by, or at least if not bound by ought to follow, a very similar decision in the case of *Reg.* v. *Bridge* (1)—a decision of the Divisional Court, consisting of Fry L.J. and Mathew J.—where, notwithstanding words very similar to these (not strictly identical), they held that a question of law was involved, and that an appeal by way of case stated ought to be allowed. But I think that when that case is examined it is apparent that different considerations apply. At the date when the section corresponding to s. 33 was first enacted by the Metropolis Management Act, 1855, there was no provision whatever in the nature of appeal from a decision by the magistrate ; there was a proceeding by certiorari, but there was no proceeding in the nature of case stated. Then came the subsequent Act of 1879

(1) 24 Q. B. D. 609.

C. A. 1907

WEST-MINSTER CORPORATION v. GORDON HOTELS, LIMITED.

Cozens-Hardy M.R.

—the Summary Jurisdiction Act, 1879—and the view taken by the Court was that when subsequent legislation had enacted in general terms that there should be a right of appeal by way of case stated from any order or decision of magistrates the generality of that provision ought to override the particularity of the former provision. That may or may not have been well founded. In the present case we find in the same Act of Parliament a provision giving an appeal to quarter sessions in certain cases both as to fact and to law—that is, s. 125 ; and then we have this s. 33, sub-s. 2, which says that in this particular case as to what is or is not trade refuse the decision of the magistrate shall be final. That is a clause which is contained in an Act passed long after the Act of 1879 giving power to magistrates to state cases generally.

It does certainly seem rather hard that a question of this nature, upon which we are told magistrates have taken different views, and which undoubtedly is one of importance, should not be capable of being brought up for the decision of the High Court or of the Court of Appeal. That, however, is a question of policy which it is not for us to consider. I think our duty simply is to obey the language of s. 33, sub-s. 2, and not to do that which Mr. Macmorran's argument really invites us to do, to hold that s. 33, sub-s. 2, might just as well have been omitted from the Act altogether. I therefore feel bound to say that in my opinion this preliminary objection ought to be allowed and the appeal ought to be dismissed, but as this objection was not taken in the Court below the appeal will be dismissed without costs.

VAUGHAN WILLIAMS L.J. Very reluctantly I concur. The words in the 2nd sub-section of s. 33 seem to me too strong for us, and I agree with the argument of Mr. Danckwerts with reference to the case of *Reg.* v. *Bridge*. (1) Under those circumstances there is nothing to do but to obey the words of the 2nd sub-section. I do not feel quite confident myself that Parliament really intended what I cannot help calling a piece of retrograde legislation ; but we have nothing to do with that. We can only

(1) 24 Q. B. D. 609.

judge of what they intended through their words. The words as used do not lead to such an absurd result that we can refuse to construe the words according to their natural meaning.

I am therefore of opinion that the preliminary objection should succeed.

BUCKLEY L.J. I most reluctantly agree. I am not so clear as the Master of the Rolls as to the exact bearing of *Reg.* v. *Bridge.* (1) I think there is more to be got out of it in Mr. Macmorran's favour. I hope that in this decision we are not precluding such matters as this coming up to this Court if the exact course be not taken which the special case shews was taken by the magistrate in this case. I hope that it may be possible for the magistrate instead of first making the order and then stating that, the appellants being dissatisfied with his decision, he has agreed to state a case, to say that his decision is arrived at subject to a case which he states. If that were done I think the case could be brought before this Court.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Allen & Son; Stanley, Woodhouse & Hedderwick.*

(1) 24 Q. B. D. 609.

W. C. D.

1907

March 15.

SMITH *v.* ASSOCIATED OMNIBUS COMPANY.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8 —*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in Manual Labour*"—*Driver of Motor Omnibus.*

The driver of a motor omnibus who has, when out with the omnibus, to do such necessary repairs to it as he is able to do, is a person "otherwise engaged in manual labour" within s. 10 of the Employers and Workmen Act, 1875, and is, therefore, entitled to the benefit of the Employers' Liability Act, 1880.

Cook v. *North Metropolitan Tramways Co.*, (1887) 18 Q. B. D. 683, distinguished.

Appeal of the plaintiff from the Bloomsbury County Court.

The plaintiff was in the employment of the defendants as a driver of a motor omnibus, and the action was brought under the Employers' Liability Act, 1880, in respect of injuries sustained by the plaintiff through the flying back of the starting handle of a motor omnibus when the plaintiff was attempting to start the engine. Evidence was given by the plaintiff that his duties were to drive the motor omnibus and to set the omnibus in motion by means of the starting handle. It was also part of his duties when out with the omnibus to do any such necessary repairs as he was able to do, for which purpose he was provided with spanners and wrenches.

The county court judge held that there was no evidence that the plaintiff was a "workman" within the Employers' Liability Act, 1880 (1), and nonsuited the plaintiff.

E. F. Lever, for the plaintiff. The county court judge was wrong in holding that the plaintiff was not a "workman" within

(1) The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8: "The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10: "In this Act the expression 'workman' does not include a domestic or menial servant, but save as aforesaid means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . . has entered into or works under a contract with an employer . . . ."

1907

SMITH v. ASSOCIATED OMNIBUS COMPANY.

the Employers' Liability Act, 1880. The plaintiff may not come within any of the classes specifically mentioned in s. 10 of the Employers and Workmen Act, 1875; but he was "otherwise engaged in manual labour" within that section, and the manual labour was ejusdem generis with some of those classes. *Cook* v. *North Metropolitan Tramways Co.* (1), the case of a driver of a horse tramcar, and *Morgan* v. *London General Omnibus Co.* (2), the case of an omnibus conductor, are distinguishable, for there is evidence here that the plaintiff, in addition to driving, had to set the machinery in motion in order to start the omnibus, and had also to do repairs. Although Lord Esher M.R. in *Yarmouth* v. *France* (3) spoke of "his real labour, that which tests his muscles and his sinews," he was not intending, as is sometimes supposed, to lay down as a general principle that manual labour, to come within s. 10, must be labour of an especially arduous character.

Thorn Drury, for the defendants. This case cannot be distinguished from *Cook* v. *North Metropolitan Tramways Co.* (1) The real and substantial labour which the plaintiff has to perform is driving an omnibus, and that is not manual labour ejusdem generis with any of the specific kinds mentioned in s. 10. The doing of repairs is merely incidental to his real employment, and there is no evidence that he in fact has ever done any repairs. A. L. Smith J. pointed out in *Morgan* v. *London General Omnibus Co.* (4) that railway servants were expressly included in the Act of 1880, the inference being that they did not come within s. 10 of the Act of 1875, and if a railway servant is not within s. 10 it is difficult to see how the driver of a motor omnibus can be. [He referred to *Hunt* v. *Great Northern Ry. Co.* (5)]

DARLING J. In my opinion this appeal succeeds. The question is whether the plaintiff is a workman within the meaning of the Employers' Liability Act, 1880. That depends on whether he

(1) 18 Q. B. D. 683.
(2) (1883) 12 Q. B. D. 201; (1884) 13 ibid. 832.
(3) (1887) 19 Q. B. D. 647, at p. 651.
(4) 12 Q. B. D. at p. 207.
(5) [1891] 1 Q. B. 601.

1907

SMITH v. ASSOCIATED OMNIBUS COMPANY.

Darling J.

comes within the definition of workman given in s. 10 of the Employers and Workmen Act, 1875, which says that the expression "workman" means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour has entered into, or works under, a contract with an employer. The plaintiff clearly does not come within some of those specified industries, and on the evidence before us it is difficult to say that he is an artificer, though I am inclined to think that evidence could be given which would shew that some drivers of motor omnibuses are artificers, that is to say, that they are trained for the mechanician's work which they have to do. Then can it be said that the plaintiff was "otherwise engaged in manual labour" within the meaning of the section. It was held in *Cook* v. *North Metropolitan Tramways Co.* (1) that the driver of a horse tramcar is not a person engaged in manual labour. I do not think that all the reasons given for the decision in that case are quite satisfactory, but, however that may be, the case is not an authority binding on us in the present case, for the facts of the two cases are not the same. The duties of the plaintiff are very different from those of the driver of a horse tramcar. The evidence is that he has to work the motor omnibus by means of a starting handle, and he has to do other things as well. He is supplied with spanners and wrenches, not casually, but as part of his working apparatus, and if anything goes wrong with the mechanism of the car when on the road the driver has to do such necessary repairs as he is able. Further, I think that we are entitled to use our own knowledge as to the sort of work which these men do, for, as Lord Esher M.R. pointed out in *Morgan* v. *London General Omnibus Co.* (2), "In construing Acts of Parliament the judges of the Queen's Courts must use their own knowledge of the various employments existing throughout the realm." Therefore, when the plaintiff gives evidence that he is a person who is provided with wrenches and spanners and is expected to execute repairs to motor omnibuses, I am entitled to use my own knowledge that the nature of the plaintiff's employment involves somewhat complicated operations and necessitates

(1) 18 Q. B. D. 683. (2) 13 Q. B. D. at p. 833.

the use of a certain amount of strength. I do not mean to say that, if the plaintiff had merely to turn a handle in order to start the omnibus, he would be a workman within this section. I base my decision on the ground that the plaintiff, in addition to his other duties, has to do a certain amount of repairing work. It is said that there is a prevalent impression that manual labour means hard labour involving a very great exercise of the muscles. Even if that is true generally, I do not think that it applies to the words "manual labour" in this section. It is said that those words must be construed ejusdem generis with the kinds of labour specifically mentioned in the section, but the persons mentioned do not necessarily do what can be called hard labour. One of the classes of workmen included is that of servants in husbandry, and the best description of their work which I can think of at the moment occurs in "The Deserted Village," where it is said, "For them light labour spread her wholesome store."

I come to the conclusion that the plaintiff was engaged in manual labour within the meaning of s. 10 of the Act of 1875, and there must therefore be a new trial.

A. T. LAWRENCE J. I am of the same opinion. I think that the county court judge gave a wrong interpretation to the word "workman" in the Employers' Liability Act. For my part I am not disposed to extend the doctrine of *Cook* v. *North Metropolitan Tramways Co.* (1), but, while accepting that decision, I cannot help thinking that the plaintiff is within the definitions in s. 10 of the Act of 1875. All the words of the section must be read, and it begins by saying that the expression "workman" does not include "a domestic or menial servant," "but save as aforesaid means any person who," &c. I think that that shews that the only limitation on the words "or otherwise engaged in manual labour" is that the manual labour must be ejusdem generis rather with that of the other classes specifically mentioned in the section than with that of a domestic or menial servant. In my opinion the evidence in this case shews that the work done by the plaintiff is ejusdem generis with the work done

(1) 18 Q. B. D. 683.

1907

SMITH v. ASSOCIATED OMNIBUS COMPANY.

A. T. Lawrence J.

by an artificer or a handicraftsman. The plaintiff has to do work with his hands and feet, sometimes the work is hard and at other times it is less arduous, and he has also to do repairs when the machinery breaks down. This evidence in my opinion shews that he is a workman within the words and the clear intention of the Act.

Appeal allowed. New trial ordered.

Solicitor for plaintiff: *Arnatt.*

Solicitors for defendants: *Clifford Turner & Hopton.*

F. O. R.

C. A.

1907

Feb. 13, 16.

[IN THE COURT OF APPEAL.]

TOZELAND *v.* GUARDIANS OF THE POOR OF THE WEST HAM UNION.

Poor Law—Guardians—Negligence of Officer—Liability of Guardians to Pauper Inmate—Action for Damages—Common Employment.

The employment of a pauper set to work by the guardians of the poor under the powers given to them by the Poor Law Acts and Orders is not contractual, but statutory, and therefore the defence of common employment is no answer to an action by a pauper so employed against the guardians to recover damages for injury suffered in such employment through the negligence of an officer of the guardians. But the setting the paupers to work is part of the administrative duties imposed on the guardians by statute, and an action by the pauper against the guardians for negligence of their officer in discharge of these duties will not lie.

Levingston v. *Lurgan Guardians*, (1868) I. R. 2 C. L. 202, distinguished.

Brennan v. *Limerick Guardians*, (1878) 2 L. R. Ir. 42, and *Dunbar* v. *Ardee Guardians*, [1897] 2 I. R. 76, followed.

APPEAL from the decision of a Divisional Court on appeal from the judge of the Bow County Court.

The action was brought to recover damages for personal injuries caused by the negligence of the defendants' servant. The facts are fully stated in the report of the case in the Court below (1) and the following short statement will, it is thought, be sufficient to make the arguments and judgments intelligible.

(1) [1906] 1 K. B. 538.

In September, 1904, the installation of electric light in the workhouse infirmary belonging to the defendants was being altered and increased under the supervision of Baird, the engineer of the infirmary. Baird was a permanent official of the workhouse appointed by the guardians with the assent of the Local Government Board. On September 28, 1904, Byers, the assistant electrician, also a permanent official, was carrying out the work. He applied to the labour-master for a man to assist him in the work, and the plaintiff was assigned to him for that purpose. The plaintiff was fifty-seven years old, a cigar maker by trade, who had become an inmate of the workhouse on July 9, 1904. By Byers' directions the plaintiff went with him to work on a staging formed of a ladder and a pair of steps with a scaffold board between the two. The staging collapsed, and the plaintiff was thrown to the ground and received injuries which necessitated the amputation of his leg. It was admitted that Baird was the person responsible for the insecurity of the staging. The county court judge found that the staging was insecure and Baird was guilty of negligence in allowing the plaintiff to work on it; but he held that the doctrine of common employment applied to the case and was a defence to the action. The plaintiff appealed to the Divisional Court, who held that the doctrine of common employment did not apply, and that the work was not being done by the guardians in discharge of their administrative duties, and therefore the action was maintainable, and gave judgment for the plaintiff. The guardians appealed.

Avory, K.C., and *Stephen Lynch*, for the appellants. [On the doctrine of common employment the arguments used in the Court below were repeated.] The appellants prefer to rest their case upon the second ground taken below, that the action will not lie. The duties of guardians are merely administrative and under the control of the Local Government Board, which now has the powers given to the Poor Law Commissioners by 4 & 5 Will. 4, c. 76, and the subsequent Acts. Sect. 21 of that Act provides that all persons having powers in connection with the relief of the poor shall exercise them under the control of the

C. A. 1907

TOZELAND v. WEST HAM UNION.

Commissioners, and s. 22 gives the Commissioners the sole power of making rules and orders. The General Consolidated Order of 1847, arts. 94, 112, compel the guardians to divide the paupers into classes and to keep the paupers of each class at work suitable for their capacity, and all officers must, under art. 153, be appointed by the order or with the consent of the Board. *Hickmore* v. *St. George's-in-the-East Guardians* appears to be the only English case of an action against guardians for negligence in regard to a pauper. It is not reported, but is referred to in Beven on Negligence, 2nd ed. vol. 1, p. 290. The Court of Appeal decided there was no negligence, and thus escaped deciding the question whether the guardians were liable, which Bowen L.J. said was very abstruse. In *Brennan* v. *Limerick Guardians* (1) it was held that the guardians were not liable for the negligence of their servants in taking care of a pauper in the infirmary. *Dunbar* v. *Ardee Guardians* (2) is a stronger case to the same effect. *Levingston* v. *Lurgan Guardians* (3) does not apply to this case. The question there was between the guardians and a stranger who had suffered damage from their sewage. *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (4) was a case of the same character. The position of English and Irish guardians is exactly the same.

The cause of action, if any, must arise out of the duty of the guardians towards the pauper, and the duty of setting him to work and supplying proper plant is just as much part of their ministerial duties as taking care of him in sickness. The position of a pauper may be analogous to that of a prisoner, and *Gibson* v. *Young* (5) is an authority that no action by a prisoner against the Government will lie. It was there admitted that no similar action would lie against the Crown in England, but it was attempted, unsuccessfully, to support the action under a statute of the Colony.

J. Rawlinson, K.C., and *Abinger*, for the respondent. It cannot be admitted that an action by a prisoner against the governor of a gaol for tort will not lie. It cannot be against public policy;

(1) 2 L. R. Ir. 42.
(2) [1897] 2 I. R. 76.
(3) I. R. 2 C. L. 202.
(4) (1858) 8 E. & B. 801.
(5) (1900) 21 N. S. Wales L. R. 7.

public policy would be the other way. Public policy would require that prisoners and paupers should be protected. The guardians were not in this case performing ministerial duties in any sense; they were doing for themselves work which could, and usually would, be done by a contractor, and they were exactly in the same position as a contractor would have been. There is no evidence that the enlargement, in the course of which the work was done, was ordered, or even sanctioned, by the Local Government Board. If it were only sanctioned, that would make no difference in the liability of the guardians. The Irish cases quoted relate only to failure to supply something which it was the duty of the guardians to supply. They do not apply at all to a case of misfeasance. The action is an ordinary common law action for negligence; the burden is on the appellants to shew that there is something in the position of the guardians which prevents the action lying against them, and they have not shewn it.

Avory, K.C., in reply.

Cur. adv. vult.

SIR GORELL BARNES, PRESIDENT. This is an appeal from the judgment of the Divisional Court, which was for the plaintiff for 100*l.* damages. [The President stated the facts of the case as above, and continued:—] The first point taken for the defendants was that this was a case to which the doctrine of common employment ought to be applied. I do not propose to consider that point at any length, because the learned judges in the Court below were all against the defendants, and I fully agree with the judgments which were delivered by the learned judges and the reasoning which I find in the judgment of the Lord Chief Justice. The second point which was taken in the Divisional Court was that the plaintiff had no right of action at all, in the circumstances disclosed in this case, against the defendants. It is clear from the judgments in the Court below that this point was considered one of very considerable difficulty and doubt, and I have certainly myself felt some difficulty in considering it. We have one advantage which the Court below had not, because the counsel for the defendants have been able, apparently, since the argument in the

C. A. 1907

TOZELAND v. WEST HAM UNION.

The President.

Court below, to discover a case before the Irish Court of Appeal called *Dunbar's Case* (1)—which I will refer to later—which was not cited in the Court below, and, though not precisely the same as this, has certain features about it and certain considerations applicable to it which make it a very valuable authority to consider in arriving at a conclusion in this case.

Now to my mind the question to be determined does not depend upon a mere consideration of which of the two classes of cases referred to in the Court below is the more applicable to the present. It seems to me that the question depends upon a very careful consideration of the position of the board of guardians who are the defendants in this case. The exceptional character of a case of this kind is pointed out in a passage in Mr. Beven's work on Negligence, vol. 1, p. 288, where it says this: "A case exceptional in its nature, but somewhat analogous in its incidents to the relations between the different officers of Government departments, is found where the arrangement and control over matters of public concern is given by statute to one body, while the power of carrying them out is assigned to another, as in the case of the jurisdiction exercised by the Local Government Board over poor law guardians." Therefore it seems to me that it is necessary, in order to arrive at a conclusion in this case, to consider what is the statutory position of the defendants so far as regards persons in the position of the plaintiff. That depends upon a careful consideration of the various Acts, of which there are a great number.

[The President then read, or stated the effect of, the following sections and articles of Poor Law statutes and orders:—55 Geo. 3, c. 137, s. 5, which provides that paupers who refuse to work may be brought before the magistrates and committed to prison. 4 & 5 Will. 4, c. 76, s. 15, which enacts that "From and after the passing of this Act the administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the said Commissioners" (now the Local Government Board), and then authorizes and requires the Commissioners "from time to time

(1) [1897] 2 I. R. 76.

as they shall see occasion, to make and issue all such rules, orders, and regulations for the management of the poor . . . . and for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor . . . . and for carrying this Act into execution in all other respects, as they shall think proper; . . . .": s. 23, which enables the Commissioners, with the consent of a majority of the guardians of any union, to order and direct such guardians to build a workhouse: s. 25, which empowers the Commissioners, without any such consent, to direct guardians to alter a workhouse: ss. 26, 32, 38, 42, which give the Commissioners powers to form unions and dissolve them, and to fix the number and provide for the election of guardians, to make rules, orders, and regulations to be observed and enforced at every workhouse: s. 46, which empowers the Commissioners, "by order under their hands and seal, to direct the overseers or guardians of any parish or union . . . . to appoint such paid officers with such qualifications as the said Commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor . . . . and otherwise carrying the provisions of this Act into execution"; and "to define and specify and direct the execution of the respective duties of such officers, and the places or limits within which the same shall be performed, and direct the mode of appointment and determine the continuance in office or dismissal of such officers," the amount and nature of the security to be given by them, and when the Commissioners should see occasion to regulate the amount of these salaries: s. 93, which forbids any spirituous or fermented liquor to be brought into a workhouse, except under the authority of a surgeon, or "in conformity with any rules, orders, or regulations of the Commissioners": s. 95, which imposes penalties upon any overseer, master of a workhouse, or other officer of any parish or union who shall wilfully disobey the legal and reasonable orders of such justices and guardians in carrying the rules, orders, and regulations of the Commissioners or the provisions of the Act into execution. 5 & 6 Vict. c. 57, s. 5, which empowers guardians to set casual paupers to work, and imposes a penalty for not doing work. 29 & 30 Vict.,

C. A. 1907

TOZELAND v. WEST HAM UNION.

The President.

c. 113, s. 15, which makes a pauper who refuses to perform any task of work prescribed by the guardians, "such task being suited to the age, sex, strength, and capacity of such person, and being of a nature and description of which the Poor Law Board shall have previously approved," liable to punishment under the Vagrancy Acts. 34 & 35 Vict. c. 108, s. 6, which enacts that "Every casual pauper shall, subject to the provisions of this Act, be admitted, dieted, and set to work and discharged in such manner and shall be subject to such regulations as the Poor Law Board shall prescribe." Consolidated General Order of July 24, 1847, art. 98, which provides for the classification of paupers: art. 112, which provides that "The paupers of the several classes shall be kept employed according to their capacity and ability; and no pauper shall receive any compensation for his labour": art. 153, which directs the guardians to appoint fit persons to hold "the under-mentioned offices," which do not include the office of an engineer: and art. 172, which directs the guardians to pay to their officers such salaries or remuneration as the Commissioners may from time to time direct or approve.]

The President continued:—A set of regulations was produced, dated August 5, 1903, addressed to the guardians of the West Ham Union. I do not propose to go through all those, but art. 27 empowers the guardians to employ such other persons besides those above mentioned (the persons above mentioned are mentioned in art. 25, but they do not include the engineer) as they may think fit in or about the infirmary, upon such terms and conditions as shall appear to the guardians to be suitable.

What is, then, the result of a general consideration of these Acts and regulations? It appears to me that the result is to shew that the guardians have merely ministerial acts to perform with regard to the poor who are under their care, both with regard to food and work and otherwise; that they do occupy that peculiar position which is referred to in the passage which I have read from Mr. Beven's book on Negligence.

There are very few cases in connection with this branch of the law. Possibly it may be because of the difficulty, if there is a claim against the guardians other than in respect of those

matters which they are authorized specially to deal with in connection with the rates, in getting any money out of them. In this case I do not know how counsel for the plaintiff suggested that, if he succeeded in the case, he would be able to enforce his judgment against any moneys that could be got out of the rates or otherwise. There are two classes of cases which have been referred to in the course of the judgments in the Court below. The first of these cases is *Southampton and Itchin Bridge Co.* v. *Southampton Local Board.* (1) [The President stated the facts of that case, and continued:—] At the close of his judgment Wightman J. said: "The only question now is whether an action for a wrong will lie against the local board eo nomine. By s. 139 of the Public Health Act, 1848, the case is put of an action brought against the local board; and it is said that in such case such action shall not be maintained unless previous notice thereof has been left one month before action at the office of the board. It is further said that the defendant in such action may tender amends and may plead such tender to the action. These enactments seem to assume that an action for a wrong may be brought against a local board of health, and that the local board of health may plead to such action. Then this declaration is prima facie sufficient, and must be answered by plea. It is unnecessary to decide now what fund, if any, is liable to pay the damages."

That case has, I think, when the facts are considered, no real bearing upon the question at all. It was the case of an outside person making a claim against the defendant, and the learned judges held that the outside person had, by virtue of the provisions of the particular statute which was being considered, a remedy against the defendant. It has no relation, to my mind, to a question dealing with the relationship of the defendants in this case to the paupers whom they have to look after in their ministerial capacity. Now another case which bears upon the matter, and which was very much relied upon in the Court below as being in favour of the plaintiffs, is the case of *Levingston* v. *Lurgan Guardians.* (2) There "an action was brought against the poor law guardians of a union in their corporate capacity

(1) 8 E. & B. 801. (2) I. R. 2 C. L. 202, 219.

C. A. 1907

TOZELAND v. WEST HAM UNION.

The President.

for injury caused to the plaintiffs by making a sewer and discharging sewage from the workhouse into a stream to the use of which the plaintiff was entitled." Again, that is a case of a claim made by an outside person, for a wrong done by the board as a board, there being no relationship whatever between the two parties to the action: it is an independent wrong. The Court of Common Pleas gave judgment for the defendants, holding that the action was not maintainable, and from that judgment error was brought, and Whiteside C.J., in delivering the judgment of the Court, went fully into the position of the defendants in that action, and after a critical examination of the Poor Relief Act (Irish) (1 & 2 Vict. c. 56), he finally held that the plaintiff could recover, basing his judgment on these grounds: "Upon the ultimate decision in these two cases, *Mersey Docks Trustees* v. *Gibbs* (1) and *Coe* v. *Wise* (2), it must, I think be now taken as established—first, that unless the provisions of the Legislature, by express enactment or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation, or public trustees acting gratuitously for public purposes; secondly, that they are not exempted by the Legislature from this liability, because the legislative provisions which regulate them do not provide funds out of which the damages recovered in an action against them can be paid, or because these provisions specially apply their funds to purposes not including the payment of such damages; and, thirdly (what indeed may be considered as in principle comprised in the second proposition), that this liability subsists, although no property, whether provided by Act of Parliament or otherwise, be shewn to exist, liable to execution on a judgment."

I think, when one looks through the whole of the report, the main question which was argued was very similar to that in the case of *Mersey Docks Trustees* v. *Gibbs* (1) as to liability of a corporation to a person who is not in a relationship of any sort or kind which bears any analogy to the position of the plaintiffs in the present case. Those two cases seem to me, for reasons which I have endeavoured to express, not in point; they are

(1) (1866) L. R. 1 H. L. 93. (2) (1864) 5 B. & S. 440.

cases of claims by outside claimants, and do not seem to me to be in the least decisive of the present case, or really to throw any light upon the questions we have to determine. The other class of cases is of a different character. Again, they are Irish cases. The first of them is *Brennan* v. *Limerick Guardians*. (1) [The President stated the facts of that case, and continued :—]

The judgment of the Court—O'Brien, Fitzgerald, and Barry JJ.—was delivered by Fitzgerald J., and it contains this passage : " It will be gathered from the sections referred to " (that is, after the learned judge had reviewed the various sections of the Poor Law Acts in Ireland) " that, although the guardians of the poor are a corporation to take order for the relief of the destitute poor, they are subordinated to and are under the control of and governed by the Poor Law Commissioners, and that law imposes on the latter the duty of fixing the staff of paid officers to act under the guardians, and gives to the Commissioners also the power of removal. The Commissioners may direct the increase or diminution of the staff and fix the duties of the respective officers. The guardians cannot appoint paid officers unless and until the Commissioners have previously sanctioned the creation of such offices. The guardians may fill up vacancies, but they cannot add to the existing staff without the order of the Commissioners. The maintenance of workhouse hospitals forms part of the general relief of the destitute poor." Then there comes this passage : " Upon a consideration of these provisions of the Poor Law Acts we have come to the conclusion that the workhouse hospital is portion of the union workhouse, in which the guardians are to take order for the relief of the destitute and sick poor, but subject to the control of the Commissioners ; that it is for the Commissioners and not the guardians to determine and direct what staff should be appointed for the workhouse hospital as for any other portion of the union workhouse ; and that the duty of the defendants was 'not to provide proper attendants to watch over the plaintiff's son,' but that their duty was to select and appoint such staff of paid attendants as the Commissioners should by their order warrant and direct. The plaint does not state or rely on any order of the Commissioners, or allege that

(1) 2 L. R. Ir. 42, 46, 48.

C. A. 1907

TOZELAND v. WEST HAM UNION.

The President.

the guardians neglected to carry out any such orders, or to appoint such staff as the Commissioners directed." It is true that at a later part of the judgment there are passages of a more general character, but those passages which I have read seem to me to indicate the principal basis on which the judgment proceeded. It only requires a statement of that case, and the passages from the judgment which I have read, to shew the difference between that class of case and the cases to which I have already referred.

The next case, which was not cited before the Divisional Court, is *Dunbar* v. *Ardee Guardians.* (1) There the plaintiff sued the guardians, under Lord Campbell's Act, for damages in respect of the negligence of the officials by which the death of her son, a patient in the workhouse hospital, was accelerated, if not caused, and it was held, affirming the decision of the Exchequer Division, that the action did not lie.

The judgment of the Court was delivered by FitzGibbon L.J., and there are one or two passages only which I should like to refer to. He says: "The question really at issue is whether guardians of the poor are answerable in damages in their corporate capacity for injuries caused by the negligence of union officers in the treatment of poor patients received into workhouse hospitals. *Levingston* v. *Lurgan Guardians* (2), decided by the Exchequer Chamber in 1868, shews that guardians are answerable to third parties for the wrongful acts, and apparently also for the negligent injurious acts, of those acting under their orders or on their behalf. But we have to consider whether the same liability extends to injuries arising from the negligence of servants who have been properly employed by the guardians to discharge ministerial duties towards the recipients of relief under the poor law itself; in other words, towards persons accepting from the guardians, and under the Poor Law Code, the eleemosynary provision made for them. Upon this question there is a paucity of authority which is almost unaccountable if this liability exists." Further on he says: "Again, the duty of the guardians under the statute is limited to providing the means of relief, and proper persons to administer

(1) [1897] 2 I. R. 76, 84, 91. (2) I. R. 2 C. L. 202.

it, and I think the idea would never occur to anyone entering a workhouse hospital that the guardians were further liable to insure the recipient of relief against negligence on the part of the persons employed to give it. Such persons would be liable for their own acts or defaults, but I cannot hold that those personal acts or defaults of the subordinates are, in law, the acts of the guardians, nor are they acts which the guardians either could do themselves, or assumed the responsibility of doing through their servants. In short, the part of the machinery of relief which failed in its duty was not either the guardians, or so far under the orders or control of the guardians, as to make its work their work, or the actors their servants acting for them. I think that 'respondeat superior' does not apply, and that the guardians are not answerable, in damages, for any injury caused by the neglect or default of the master in the discharge of what were his duties under the statutes and regulations affecting his office." The two last cases I have referred to are very much in point in considering the present case. It is quite true that there may at first sight appear to be some difference between administering relief and looking after a patient so as to see that he does not jump out of the window in a state of delirium, and the employment of him on duties which the guardians are entitled to employ him upon under the provisions to which I have referred, and, therefore, there may be a difference at first sight between the duty to look after him as a person who wants food and care and the duty to look after him as a person who is employed in work in which the guardians are authorized to employ him. But, after reflecting over this case, I fail to see any distinction in principle between the obligation in one respect and the obligation in the other. Both sets of matters appear to me to be matters which are dealt with in the ordinary course of administration of poor law relief. The statutes deal with the way in which the pauper is to be looked after and the way in which he is to be cared for, and so do the regulations, and they also deal with the question how he is to be employed, and that he shall be employed, and that he is not entitled to any payment for his labour, and so forth. It seems to me it is all part of the administration of the poor law relief,

C. A. 1907

TOZELAND v. WEST HAM UNION.

The President.

and that the action is not maintainable either in the one case or in the other. For these reasons it seems to me that the distinction between this class of cases and that of which the *Southampton Case* (1) and the *Levingston Case* (2) are examples is clear. They are cases of a claim by an outside person who has nothing to do with the administration of the poor law relief, and who does not by virtue of his coming in as a pauper place himself in any way under the provisions of the statutes, and the question is quite different from that which arises in the class of cases in which the person who is complaining is a person in the workhouse, whose relationship to the defendants is governed by the whole of the statutes and regulations which relate to the administration of the poor law relief.

For these reasons, in my opinion, the judgment of the Court below on the second point is wrong, and the action will not lie against the defendants, and the appeal must be allowed.

FARWELL L.J. I agree with the Divisional Court that the doctrine of common employment has no application to the present case, on the ground that such doctrine rests on the contractual relationship existing between master and servant, an implied term of which is that the servant takes the risks arising from his fellow-servants' negligence. In the present case there is no contractual relationship, the guardians employ the man in performance of their duty under the Poor Law Acts and art. 112 of the General Consolidated Order, July 29, 1847, "The paupers of the several classes shall be kept employed according to their capacity and ability"; and the pauper works because he is compelled to do so by 55 Geo. 3, c. 137, and art. 127 of the same General Consolidated Order, if he wishes to avoid the penalties thereby imposed. The employment therefore is not contractual, but statutory. On the second point, however, having had the advantage, which the Divisional Court had not, of reading the judgment of the Court of Appeal in Ireland in *Dunbar* v. *Ardee Guardians* (3), I am unable to agree with them. In my opinion

(1) 8 E. & B. 801. (2) I. R. 2 C. L. 202.
(3) [1897] 2 I. R. 76.

that case is undistinguishable in principle from the case before us, and I agree with the reasoning of the Irish Court. Counsel agree that the English Acts are practically undistinguishable from the Irish, and it would certainly be unfortunate if a different construction was placed on them in the two countries. The President has already referred to the statutes, and I need not, therefore, refer to them in detail. The guardians are incorporated by 5 & 6 Will. 4, c. 69, s. 7, and are entrusted with the relief and employment of the poor by the Acts already referred to by the President. Amongst their duties are those already mentioned of keeping the pauper inmates of the workhouse employed. They are also bound on receiving an order from the Local Government Board to appoint proper officers for superintending or assisting in the administration of the relief and employment of the poor, and to pay such officers the salaries approved by the Local Government Board out of the rates. Whatever may be the rights of third persons against guardians, the relation of the Local Government Board, the guardians and their officers, and the paupers to one another is regulated by statute in such a manner that the ordinary considerations arising out of the relation of principal and agent and master and servant have no application. The acts done by the guardians are all ministerial acts in performance of statutory duties to maintain and employ the paupers, for the due performance of which they are answerable to the Local Government Board; the guardians and their officers put the pauper to work, and the pauper works under statutory compulsion, not under any contractual relationship. As in *Dunbar* v. *Ardee Guardians* (1) it was held that no action would lie against the guardians for neglecting to provide a properly guarded room and proper officers and nurses and attendants for a sick pauper, because they were under no duty to the pauper so to do, but in making such provisions as they did were acting ministerially and were answerable only to the Local Government Board, so here the guardians were under no duty to the pauper to find him proper work adapted to his capacity, but acted ministerially in so doing, and the pauper had a right of appeal if the work was unsuited to his capacity or such as he could not perform with

(1) [1897] 2 I. R. 76.

C. A. 1907

TOZELAND v. WEST HAM UNION.

Farwell L.J.

safety. I agree with the Court of Appeal in Ireland that guardians are not liable for injuries to paupers arising from the negligence of officers or servants who have been properly employed under the statute to discharge statutory duties towards the recipients of relief. It was argued that this was a case of guardians acting as their own contractors instead of employing an independent contractor. I am not aware of any power in guardians so to act, but the facts of the present case do not support the contention; the small details of work done were such as could properly be done by the guardians, without the intervention of a contractor, under their duty to maintain the building.

BUCKLEY L.J. In my judgment this appeal ought to be allowed, upon the ground that an action will not lie by a pauper against the guardians of the poor in their corporate capacity for negligence of subordinate officers or servants in an act done in discharge of the ministerial duty of the guardians. For the purposes of this judgment I think it unnecessary to determine exactly what was the relation between the guardians and the engineer or assistant engineer who was responsible for the scaffolding. If it were necessary to determine exactly whether he was the servant of the guardians or not, I should think it essential to be informed more particularly of the facts relating to his appointment and to examine more exhaustively the provisions of the Acts and regulations relating to his employment. In my judgment, however, the result is the same whether he was the servant of the guardians or not. The authorities which have been referred to in the Irish Courts are interesting and instructive, and are very pertinent to the matter for decision. They are, of course, not binding upon us, but I will use them at least for the purposes of illustration. If the question were whether the guardians could be sued in their corporate capacity in a civil action by a third party for such acts as nuisance by pollution, or by noise, or by interference with light, it may well be that an action would lie. *Levingston* v. *Lurgan Guardians* (1) was a case of that description. It is not necessary here to decide

(1) I. R. 2 C. L. 202.

whether that was right, though I am far from expressing an opinion that it was not. The question there was not one of negligence in ministerial duty, but one of injury to the property of a third party. *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (1) and *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (2) are in such a case instructive. The question is to my mind entirely different when the plaintiff in the action is a person who is an object of the duties which the guardians have ministerially to perform. The proper administration of the poor law is, of course, a matter to be enforced. The question, however, is whether a pauper, in an action brought against the guardians in their corporate capacity, is a person capable of enforcing it. In my opinion he is not. The guardians no doubt owe the duty of providing the pauper with proper and sufficient food, with buildings of proper construction, with proper sanitary arrangements, and the like. But, as matter of public policy, it would be impossible that a pauper should be entitled to bring his action against the guardians for default so to do. That is a matter to be controlled by the Local Government Board. To another matter which concerns not the supply to the pauper of that to which under the poor law he is entitled, but the demand from the pauper of the labour which under that law he is compellable to give, the same principle, I think, applies. The guardians had the right and owed the duty of calling upon the pauper to do such work as lay within his capacity. Upon the question of fact as to capacity, the pauper had the right to test it by appealing to the labour-master or to the visiting committee. The guardians here, by the assistant engineer, called upon the pauper to do certain work, and the assistant engineer employed for the purpose a scaffold negligently constructed. In doing these acts the guardians were, in my opinion, acting ministerially. Their ministerial duty of supplying something to the pauper, such as proper nourishment, lodging, clothing and the like, and their ministerial duty of relieving the rates by calling upon the pauper to do work properly falling within his capacity, do not, in my opinion, differ for the present purpose. Their duty to provide him

(1) 8 E. & B. 801. (2) L. R. 1 H. L. 93.

C. A. 1907

TOZELAND v. WEST HAM UNION.

Buckley L.J.

with a proper room to sleep in, their duty to provide him with a proper room to work in, and their duty to provide him with proper tools and plant for his work, all seem to me to rest upon the same basis of obligation. The guardians are a corporation whose function is the relief of the poor, but they are subordinate to the Local Government Board. They are a subordinate administrative body, and are not even the supreme members of the department to which the negligent subordinate belongs. It was held in Ireland in *Brennan* v. *Limerick Guardians* (1), a case which was approved in the Appeal Court in Ireland, in *Dunbar* v. *Ardee Guardians* (2), that in such a case the guardians are not liable. The act there, it is true, was one of negligence in the duty of supplying something to the pauper, and not, as here, negligence in providing for the pauper proper tools and appliances for the execution of the work required from him. In my judgment, however, those two matters do not differ in principle. I agree with the reasoning of the judgment of the Court of Appeal in Ireland as delivered by FitzGibbon L.J. in *Dunbar* v. *Ardee Guardians.* (2) It seems to me applicable mutatis mutandis to the English Poor Law Acts, and to such an act by the subordinate officer as is in question in the present case, and, that being so, the action, in my opinion, will not lie. It results that the appeal must be allowed.

Appeal allowed.

Solicitors: *Hillearys ; Philbrick & Co., for Haynes, Robinson & Co., Bow.*

(1) 2 L. R. Ir. 42.

(2) [1897] 2 Ir. R. 76.

J. R. B.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1st, 1907, will be as follows:—

In the First Series,
[1907] 1 Ch. [1907] 2 Ch.

In the Second Series,
[1907] 1 K. B. [1907] 2 K. B. [1907] P.

In the Third Series,
[1907] A. C.

INDEX.

ACTRESS—Employed at theatre—Negligence of fellow employee—Construction of contract - - - - - - - **544**
See EMPLOYER AND WORKMAN. 1.

ADMIRALTY.
See under SHIPPING.

ADMISSIBILITY—Evidence.
See under EVIDENCE.

ADULTERATION—"*Prejudice of the purchaser*"—*Rum diluted with Water—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6.

A notice exhibited by an innkeeper that "All spirits sold in this establishment . . . . in order to comply with the Food and Drugs Act, will not be of any guaranteed strength" is not sufficient to bring to the mind of the purchaser the fact that the spirits sold are diluted to a strength below the standard provided by s. 6 of the Sale of Food and Drugs Act Amendment Act, 1879. Therefore, where rum is sold by the innkeeper consisting of 96·3 parts of rum of 25 degrees under proof as mentioned in s. 6 of the Act of 1879 and 3·7 parts of added water, the notice is not sufficient to protect the innkeeper from conviction under s. 6 of the Sale of Food and Drugs Act, 1875, for selling rum to the prejudice of the purchaser.

So *held* by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting). DAWES *v.* WILKINSON **Div. Ct. 278**

ADVERTISEMENTS — Obscene libel—Publication—Aiding and abetting—Advertisements in a newspaper - - - **388**
See CRIMINAL LAW. 2.

AFFREIGHTMENT—Contract of—Ship—Bill of lading—Exception clause—Deviation
See SHIPPING. 8. **660**

AFTER-ACQUIRED PROPERTY—Undischarged bankrupt - - - - - - **149**
See BANKRUPTCY. 7.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGREEMENT.
See under CONTRACT.

AIDING AND ABETTING — Conviction—Evidence—Motor car - - - **40**
See JUSTICES.

—— Obscene libel — Publication — Advertisements in a newspaper - - - **388**
See CRIMINAL LAW. 2.

APPEAL—Application by respondent for leave to appear in forma pauperis—Opinion of counsel - - - - - - **181**
See PRACTICE. 1.

—— Special case—Removal of refuse—Hotel—Trade refuse—Public Health (London) Act - - - - - - - **910**
See LONDON. 2.

—— Time—Mistake as to effect of rule—Order in matter not being an action—Appeal brought too late — Special leave to appeal - - - - - - - **1**
See PRACTICE. 2.

ARBITRATION — Bankruptcy notice — Final judgment—Enforcing award—Entering judgment in accordance with award—Jurisdiction - - - - - **478**
See BANKRUPTCY. 1.

—— Railway companies, difference between—Arbitrator designated by name—Death of person designated - - - **356**
See RAILWAY. 1.

ARMY AND NAVY—*Volunteer Corps—Commanding Officer—Liability on Contract—Goods supplied for Use of Corps—Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *ss.* 16, 25—*Regulations* 407, 587.

Where orders are given by or on behalf of the commanding officer of a volunteer corps personally for goods for the use of the corps, and the goods are accordingly supplied, the commanding officer is personally liable for the price. If he dies before they have been paid for, his personal representatives are liable, and they cannot resist payment on the ground that the property in

ARMY AND NAVY—*continued.*
the goods so ordered and supplied has passed to the succeeding commanding officer. SAMUEL BROTHERS, LD. *v.* WHETHERLY
Walton, J. 709

ASSAY — Hall mark — Watch-cases — Foreign watches - - - - - - 95
See PLATE.

ASSESSMENT—Rates.
See under RATES.

AWARD—Bankruptcy notice—Final judgment—Enforcing award—Entering judgment in accordance with award—Jurisdiction
See BANKRUPTCY. 1. 478

BAILIFF—Distress—Costs and Charges—Agreement for extra remuneration - 690
See DISTRESS.

BANK—Cheque—Gambling in a foreign country —Loan—Consideration - - 741
See GAMING. 1.

BANKRUPTCY — *Bankruptcy Notice — Final Judgment—Enforcing Award—Entering Judgment in accordance with Award—Jurisdiction—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12 —*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

A judgment obtained in pursuance of an order purporting to be made under the Arbitration Act, 1889, to enforce an award on a submission by entering judgment in accordance therewith, is not a final judgment in an action upon which a bankruptcy notice can be founded within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

Per Vaughan Williams and Fletcher Moulton L.JJ.: The Court has no jurisdiction under s. 12 of the Arbitration Act, 1889, which provides for the enforcement of an award on a submission in the same manner as if it were a judgment, to order judgment to be entered in accordance with the award.

Per Fletcher Moulton L.J. An application for a bankruptcy notice is not a method of enforcing an award within s. 12 of the Arbitration Act, 1889. *In re* A BANKRUPTCY NOTICE
C. A. 478

2. —— *Composition—Dissentient Creditors—Payment by third Person of assenting Creditors—Notice of act of Bankruptcy—Ignorance of Law —Duty of Trustee.*

The bankrupt having mortgaged two fishing boats to some fish salesmen to secure his current account with them, and having subsequently failed in his business, the mortgagees offered to pay his creditors a composition which nearly all the creditors agreed to accept, and, after having notice that the debtor had committed an act of bankruptcy, they paid this composition in good faith to the assenting creditors, believing that they were entitled under their mortgage to add the money so paid to their security. They then sold the fishing boats, and claimed to retain the balance of the proceeds of sale, after paying themselves the amount due on their mortgage at the date of the act of bankruptcy, on account

BANKRUPTCY—*continued.*
of the composition paid to the creditors. The official receiver applied that the balance might be paid over to him:—

Held, that the mere fact that the mortgagees were not familiar with the working of the bankruptcy law was not a ground for precluding the official receiver from insisting on his right to treat this balance as part of the debtor's estate, and that the money ought to be paid over to him.

Decision of the Divisional Court, affirming the decision of the county court judge, reversed.

Ex parte James, (1874) L. R. 9 Ch. 609, distinguished. *In re* HALL. *Ex parte* OFFICIAL RECEIVER - - - - - - C. A. 875

3. —— *Garnishee Order Nisi—Payment by Garnishee to Judgment Creditor—Bankruptcy of Judgment Debtor—Relation back of Trustee's Title to garnished Debt.*

Where a debtor commits an act of bankruptcy and judgment is subsequently obtained against him by a creditor who obtains a garnishee order nisi attaching a debt due to the judgment debtor, the garnishee order nisi does not justify the garnishee in forthwith paying the debt to the judgment creditor, and if he does so the debt will still form part of the judgment debtor's estate by virtue of the relation back of the title of the trustee in bankruptcy to the act of bankruptcy. The Court will therefore, in such a case, order the garnishee, upon an application by the trustee, to pay the amount of the attached debt to the trustee. *In re* WEBSTER; *Ex parte* THE OFFICIAL RECEIVER - Div. Ct. 623

4. —— *Mortgage of Life Policy—Voluntary Payment of Premiums by third Party—Death of Mortgagor — Repayment of Premiums to Volunteer out of Policy Moneys — Duty of Trustee.*

The principle established by *Ex parte James*, (1874) L. R. 9 Ch. 609, that the Court of Chancery will not allow its officer, the trustee in bankruptcy, to retain moneys for distribution amongst the creditors, where it would be contrary to fair dealing to do so, is not confined to the case of money paid under a mistake of law, but is of general application.

The bankrupt having assigned a policy on his own life by way of mortgage to his bankers, requested his wife on the eve of his bankruptcy to pay the premiums and interest for him, and she, after paying one premium before the commencement of the bankruptcy, paid the premiums and interest during his bankruptcy until his death, when the policy moneys were received by the mortgagees, who retained thereout the amount due to them on their mortgage and paid the balance to the official receiver. The wife claimed to be repaid out of the balance the sums she had paid for premiums and interest. The official receiver had no previous knowledge that the wife had been making these payments, but it subsequently appeared that this fact had been disclosed by the bankrupt in his preliminary examination taken before a former official receiver. The official receiver moved for a declaration that he was entitled to retain the

BANKRUPTCY—*continued.*

balance of the policy moneys as part of the bankrupt's estate :—

Held, even assuming that all the payments were made during the bankruptcy, that the Court ought not to allow the official receiver, having regard to the knowledge of his predecessor, to retain the policy moneys without repaying to the wife the sums she had paid for premiums and interest.

The decision of Bigham J. affirmed.

The principle of *Ex parte James*, L. R. 9 Ch. 609, applied. *In re* TYLER. *Ex parte* OFFICIAL RECEIVER - - - - - - **C. A. 865**

5. —— *Proof—Goods in Order and Disposition of Bankrupt—Reputed Ownership—Claim by true Owner to prove for Value of Goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 8 ; *s.* 44, *sub-s.* 2 (*iii.*).

Where goods have been adjudged to be the property of a bankrupt as having been in the order and disposition of the bankrupt with the consent and permission of the true owner of the goods, under such circumstances that the bankrupt was the reputed owner of them, the true owner cannot prove in the bankruptcy either for the value of the goods or for damages for the loss of them.

Semble, the reputed ownership clause in s. 44 of the Bankruptcy Act, 1883, is a penal enactment, and, when it applies, the true owner of the goods forfeits them. *In re* BUTTON. *Ex parte* HAVISIDE - - **Bigham J. 397**

6. —— *Solicitor and Client—Cash Accounts—Draft Bills of Costs agreed—Contentious Business—Delivery of Detailed Bills waived—Stated Account—Mortgage to secure agreed Balance of stated Account—"Payment"—Bankruptcy of Client—Proof by Solicitor—Trustee's Title to go behind Mortgage and stated Account and require Particulars with Vouchers—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 41—*Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 22.

The giving of a mortgage with a covenant to pay for the agreed amount of a solicitor's bill of costs is not equivalent to payment of the bill within the meaning of s. 41 of the Solicitors Act, 1843.

Ex parte Turner, (1854) 24 L. J. (Ch.) 71 ; S. C. sub nom. *In re Boyle*, 5 D. M. & G. 540, explained.

A solicitor from time to time rendered to his client a debtor and creditor cash account, and his draft unsigned bill of costs for contentious business. On each occasion the client waived the delivery of a signed bill and discussed and agreed the amount of the draft bill, which amount was then debited against him in the cash account and a balance was struck, and the client wrote at the foot of the cash account "I agree this account" and signed it. On the third occasion the client gave the solicitor a mortgage for the agreed balance of the stated cash account, which for the main part represented the agreed sum for costs, and covenanted to pay it with interest. More than twelve months afterwards the client became bankrupt, and the solicitor claimed to prove for the principal and interest due under the covenant in the mortgage less the value of the security, and he also claimed to prove for the same principal sum on an account stated :—

Held, that as between the debtor and the solicitor, the carrying of the agreed sums for costs into the cash account and the subsequent statement of account between them was equivalent to payment of the costs within the meaning of s. 41 of the Solicitors Act, 1843, and that there were no special circumstances which entitled the debtor to require delivery of a detailed bill for taxation.

But *held* that, as between the trustee in bankruptcy and the solicitor, the trustee represented the general body of the creditors, and was entitled to go behind the covenant in the mortgage and the stated account and to require satisfactory evidence, before admitting the proof, that the claim for costs represented a genuine debt. *In re* VAN LAUN. *Ex parte* PATTULLO - - - **Bigham J. 155**

7. —— *Undischarged Bankrupt—After-acquired Property—Death of Bankrupt Intestate—Distribution amongst Next of Kin—Intervention of Trustee in Bankruptcy—Refunding to Trustee by Next of Kin.*

An undischarged bankrupt effected policies on his life and died intestate and undischarged. The administrator of his estate, without notice of the bankruptcy, distributed the policy moneys amongst the bankrupt's next of kin before the trustee in bankruptcy intervened :—

Held, that the administrator was not personally liable to the trustee for the moneys he had distributed, but that the next of kin must refund to the trustee the shares they had respectively received.

The doctrine of *Herbert* v. *Sayer*, (1844) 5 Q. B. 965, and *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262, applied.

In re Ball, [1899] 2 I. R. 313, distinguished.

The dictum of Byrne J. in *Hunt* v. *Fripp*, [1898] 1 Ch. 675, that a party, even with notice of the bankruptcy, may deal honestly and for value with the bankrupt before the trustee intervenes, approved. *In re* BENNETT. *Ex parte* THE OFFICIAL RECEIVER - **Bigham J. 149**

BARRISTER—Stamp duty—"Receipt"—Counsel's brief—Statement of fees - **462**
See REVENUE. 6.

BENEFICE—Income tax—Easter offerings **336**
See REVENUE. 3.

BIGAMY—Indictment—Second marriage contracted abroad—No averment that accused was a British subject - **383**
See CRIMINAL LAW. 1.

BILL OF EXCHANGE—Signature in blank—Authority to fill up note to limited amount—Excess of authority - **794**
See PROMISSORY NOTE.

BILL OF LADING—Shipping.
See under SHIPPING.

BREACH OF CONTRACT.
See under CONTRACT.

BRIDGE—*Approaches—Public Carriage Road carried over Railway—Liability of Railway Company to widen—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 50, 51.

The liability imposed on railway companies by s. 51 of the Railways Clauses Consolidation Act, 1845, to widen any bridges carrying roads over railways where the width of the road has been increased "beyond the width of such bridge on either side thereof" does not extend to the approaches to the bridge. RHONDDA URBAN COUNCIL *v.* TAFF VALE RAILWAY COMPANY **Phillimore J. 739**

BURIAL—*Burial Ground—Fees to Incumbent—Erection of Monuments—Consecration—"Payable"—"Used"—Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4 (*i*).

In 1893 a burial board acquired eight acres of land adjoining, but separated by a wall from, seventeen acres then being used as a burial ground, with the intention of using this additional land for burial purposes. In 1897 communication was made between the two areas, and the eight acres were laid out as a burial ground. In June, 1900, the Home Secretary sanctioned a division into consecrated and unconsecrated portions. On July 2 the petition for consecration was sent to the bishop. On July 10 the Burial Act, 1900, received the Royal Assent. On October 13 part of the eight acres was consecrated. In November, 1902, the first burial in the consecrated portion took place. The incumbent of a parish, who was entitled to receive fees other than for services rendered in respect of the seventeen acres, claimed, under s. 3, sub-s. 4 (*i*), of the Burial Act, 1900, similar fees in respect of the eight acres:—

Held, that as the incumbent's right to fees arose only in respect of the consecrated portion of the burial ground, and that as the actual consecration did not take place until after the passing of the Act, this claim to fees could not be allowed.

Decision of Channell J., [1906] 1 K. B. 338, affirmed, but on different grounds. Meaning of the words "payable," "used" for the purposes of a parish, and "used" before the passing of the Act, discussed. YOUNG *v.* KINGSTON-ON-THAMES, SURBITON, NEW MALDEN, AND COOMBE JOINT BURIALS COMMITTEE - - **C. A. 416**

—— Churchyard—Liability to poor rate—Burial ground separated from church - **27**
See RATES. 1.

CARRIAGE—Ship.
See under SHIPPING.

CARRIAGE ROAD—Repairs—Recovery of expenses—Jurisdiction of metropolitan police magistrate - - - **881**
See LONDON. 1.

CASES:—

—— *Attorney-General* v. *Glossop*, [1906] 1 K. B. 284.
Affirmed by C. A. **[1907] 1 K. B. 163**

—— *Attorney-General* v. *Mersey Ry. Co.*, [1906] 1 Ch. 811.
Order varied by C. A. **[1907] 1 Ch. 81**

CASES—*continued.*

—— *Attorney-General* v. *Wood*, [1897] 2 Q. B. 102.
Followed by C. A. ATTORNEY-GENERAL *v.* GLOSSOP **[1907] 1 K. B. 163**

—— *Balian* v. *July, Victoria & Co.*, (1890) 6 Times L. R. 345.
Followed by C. A. JOSEPH THORLEY, LD. *v.* ORCHIS STEAMSHIP COMPANY. **[1907] 1 K. B. 660**

—— *Ball, In re*, [1899] 2 I. R. 313.
Distinguished by Bigham J. *In re* BENNETT - - **[1907] 1 K. B. 149**

—— *Benford* v. *Sims*, [1898] 2 Q. B. 641.
Followed by Div. Ct. DU CROS *v.* LAMBOURNE - - **[1907] 1 K. B. 40**

—— *Bootle (Overseers of)* v. *Liverpool Warehouse Co.*, (1901) 85 L. T. 45.
Distinguished by C. A. REX *v.* MELLADEW - - - **[1907] 1 K. B. 192**

—— *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842.
Followed by C. A. EDMONDSON *v.* BIRCH & CO. AND HORNER **[1907] 1 K. B. 371**

—— *Brennan* v. *Limerick Guardians*, (1878) 24 L. R. Ir. 42.
Followed by C. A. TOZELAND *v.* WEST HAM UNION - **[1907] 1 K. B. 920**

—— *Brown* v. *Feeney*, [1906] 1 K. B. 563.
Applied by C. A. MAXWELL *v.* VISCOUNT WOLSELEY - **[1907] 1 K. B. 274**

—— *Cohen* v. *Mitchell*, (1890) 25 Q. B. D. 262.
Applied by Bigham J. *In re* BENNETT **[1907] 1 K. B. 149**

—— *Cook* v. *North Metropolitan Tramways Co.*, (1887) 18 Q. B. D. 683.
Distinguished by Div. Ct. SMITH *v.* ASSOCIATED OMNIBUS COMPANY **[1907] 1 K. B. 916**

—— *Copin* v. *Adamson*, (1874) L. R. 9 Ex. 345; 1 Ex. D. 17.
Applied by Channell J. EMANUEL *v.* SYMON - - - **[1907] 1 K. B. 235**

—— *Darling* v. *Raeburn*, [1906] 1 K. B. 572.
Affirmed by C. A. - **[1907] 1 K. B. 846**

—— *Davies* v. *Seisdon Union*, [1906] 1 K. B. 214.
Reversed by C. A. - **[1907] 1 K. B. 630**

—— *Dunbar* v. *Ardee Guardians*, [1897] 2 I. R. 76.
Followed by C. A. TOZELAND *v.* WEST HAM UNION **[1907] 1 K. B. 320**

—— *Fletcher* v. *Birkenhead Corporation*, [1906] 1 K. B. 605.
Affirmed by C. A. - **[1907] 1 K. B. 205**

—— *Forbes* v. *Aspinall*, (1811) 13 East, 323.
Discussed by Channell J. UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION **[1907] 1 K. B. 259**

CASES—*continued.*

—— *Goldsmiths' Co.* v. *Wyatt*, [1905] 2 K. B. 586.
Reversed by C. A. - [1907] 1 K. B. 95

—— *Grand Junction Canal Co.* v. *Shugar*, (1871) L. R. 6 Ch. 483.
Distinguished by Lord Alverstone C.J. ENGLISH *v.* METROPOLITAN WATER BOARD - - [1907] 1 K. B. 588

—— *Great Central Ry. Co.* v. *Banbury Union*, [1906] 1 K. B. 597.
Reversed by C. A. - [1907] 1 K. B. 717

—— *Great Eastern Ry. Co.* v. *Haughley*, (1866) L. R. 1 Q. B. 666.
Not adopted by C. A. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION [1907] 1 K. B. 717

—— *Hammersmith and City Ry. Co.* v. *Brand*, (1869) L. R. 4 H. L. 171.
Distinguished by C. A. FLETCHER *v.* BIRKENHEAD CORPORATION [1907] 1 K. B. 205

—— *Helsby, In re*, [1894] 1 Q. B. 742.
Followed by C. A. *In re* COLES AND RAVENSHEAR - - [1907] 1 K. B. 1

—— *Herbert* v. *Sayer*, (1844) 5 Q. B. 965.
Applied by Bigham J. *In re* BENNETT [1907] 1 K. B. 149

—— *Herdman* v. *Wheeler*, [1902] 1 K. B. 361.
Discussed and distinguished by C. A. LLOYD'S BANK, LD. *v.* COOKE [1907] 1 K. B. 794

—— *Hunt* v. *Fripp*, [1898] 1 Ch. 675.
Dictum of Byrne J. in, approved of by Bigham J. *In re* BENNETT [1907] 1 K. B. 149

—— *International Financial Society* v. *City of Moscow Gas Co.*, (1877) 7 Ch. D. 241.
Followed by C. A. *In re* COLES AND RAVENSHEAR - - [1907] 1 K. B. 1

—— *James, Ex parte*, (1874) L. R. 9 Ch. 609.
Distinguished by C. A. *In re* HALL, [1907] 1 K. B. 875 ; principle of, applied by C. A. *In re* TYLER [1907] 1 K. B. 865

—— *James Joicey & Co. and S. A. D. Eden's Executors* v. *North Eastern Ry. Co.*, [1906] 1 K. B. 195.
Reversed by C. A. - [1907] 1 K. B. 402

—— *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.* (No. 2), [1906] 2 K. B. 804.
Affirmed by C. A. - [1907] 1 K. B. 769

—— *Joseph Thorley, Ld.* v. *Orchis Steamship Co.*, [1907] 1 K. B. 243.
Affirmed by C. A. - [1907] 1 K. B. 660

—— *King* v. *Kemp*, (1863) 8 L. T. 255.
Not followed by C. A. MOULIS *v.* OWEN - - - [1907] 1 K. B. 746

—— *Levingston* v. *Lurgan Guardians*, (1868) I. R. 2 C. L. 202.
Distinguished by C. A. TOZELAND *v.* WEST HAM UNION [1907] 1 K. B. 920

CASES—*continued.*

—— *Midlothian County Council* v. *Oakbank Oil Co.*, (1903) 5 F. 700.
Followed by C. A. WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS - [1907] 1 K. B. 431

—— *Moel Tryvan Ship Co.* v. *Kruger & Co.*, [1906] 2 K. B. 792.
Affirmed by C. A. - [1907] 1 K. B. 809

—— *Nelson* v. *Dahl*, (1879) 12 Ch. 568.
Rule laid down in, applied by Channell J. LEONIS STEAMSHIP COMPANY *v.* RANK, LD. - - [1907] 1 K. B. 344

—— *Oppenheimer* v. *Attenborough & Son*, [1907] 1 K. B. 510.
See OPPENHEIMER *v.* FRAZER & WYATT Channell J. [1907] 1 K. B. 519

—— *Oppenheimer* v. *Frazer & Wyatt*, [1907] 1 K. B. 519.
See OPPENHEIMER *v.* ATTENBOROUGH & SON - Channell J. [1907] 1 K. B. 510

—— *Palmer* v. *Blackburn*, (1822) 1 Bing. 61.
Rule established in, applied by Channell J. UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION - [1907] 1 K. B. 259

—— *Price* v. *Union Lighterage Co.*, [1903] 1 K. B. 750 ; [1904] 1 K. B. 412.
Followed by C. A. JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD. (No. 2) - [1907] 1 K. B. 769

—— *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 524.
Discussed and distinguished by C. A. EDMONDSON *v.* BIRCH & CO. AND HORNER - - [1907] 1 K. B. 371

—— *Pyman* v. *Dreyfus*, (1889) 24 Q. B. D. 152.
Considered by Channell J. LEONIS STEAMSHIP CO. *v.* RANK, LD. [1907] 1 K. B. 344

—— *Reg.* v. *Bridge*, (1890) 24 Q. B. D. 609.
Distinguished by C. A. WESTMINSTER CORPORATION *v.* GORDON HOTELS, LD. [1907] 1 K. B. 910

—— *Reg.* v. *Inland Revenue Commissioners (Ohlson's Case)*, [1891] 1 Q. B. 485.
Discussed by Div. Ct. REX *v.* INLAND REVENUE COMMISSIONERS [1907] 1 K. B. 108

—— *Reg.* v. *Llantrissant*, (1869) L. R. 4 Q. B. 354.
Not adopted by C. A. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION - - - [1907] 1 K. B. 717

—— *Remmington* v. *Scoles*, [1897] 2 Ch. 1.
Considered and applied by C. A. CRITCHELL *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY [1907] 1 K. B. 860

—— *Richmond Hill Steamship Co.* v. *Trinity House Corporation*, [1896] 2 Q. B. 134.
Dicta in, not followed by Bray J. CAIRN LINE OF STEAMSHIPS, LD. *v.* TRINITY HOUSE CORPORATION [1907] 1 K. B. 604

CASES—*continued.*

—— *Robinson* v. *Bland*, (1760) 1 W. Bl. 234, 256 ; 2 Burr. 1077.
Followed by C. A. MOULIS *v.* OWEN [1907] 1 K. B. 746

—— *Sadler* v. *Great Western Ry. Co.*, [1896] A. C. 450.
Distinguished by C. A. BULLOCK *v.* LONDON GENERAL OMNIBUS COMPANY [1907] 1 K. B. 264

—— *Sanders* v. *Jenkins*, [1897] 1 Q. B. 93 ; 2 Com. Cas. 12.
Discussed and explained by Channell J. LEONIS STEAMSHIP COMPANY *v.* RANK, LD. - - - [1907] 1 K. B. 344

—— *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533.
Applied by C. A. BULLOCK *v.* LONDON GENERAL OMNIBUS COMPANY [1907] 1 K. B. 264

—— *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392.
Followed by A. T. Lawrence J. BANK OF ENGLAND *v.* CUTLER [1907] 1 K. B. 889

—— *Simpson* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1905] 1 K. B. 453.
Applied by C. A. BAGNALL *v.* LEVINSTEIN, LD. - - [1907] 1 K. B. 531

—— *Smith* v. *Great Western Ry. Co.*, (1877) 3 App. Cas. 165.
Distinguished by C. A. JAMES JOICEY & CO. AND S. A. D. EDEN'S EXECUTORS *v.* NORTH EASTERN RAILWAY COMPANY - - - [1907] 1 K. B. 402

—— *Smurthwaite* v. *Hannay*, [1894] A. C. 494.
Followed by C. A. BULLOCK *v.* LONDON GENERAL OMNIBUS COMPANY [1907] 1 K. B. 264

—— *South Eastern Ry. Co.* v. *Dorking*, (1854) 3 E. & B. 491.
Adopted by C. A. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION - - - [1907] 1 K. B. 717

—— *Speyer Brothers* v. *Inland Revenue Commissioners*, [1906] 1 K. B. 318.
Reversed by C. A. [1907] 1 K. B. 246

—— *Turner, Ex parte*, (1854) 24 L. J. (Ch.) 71 ; S. C. sub nom. *In re Boyle*, 5 D. M. & G. 540.
Explained by Bigham J. *In re* VAN LAUN. *Ex parte* PATTULLO [1907] 1 K. B. 155

—— *Wednesbury Corporation* v. *Lodge Holes Colliery Co.*, [1905] 2 K. B. 823.
Reversed by C. A. - [1907] 1 K. B. 78

—— *Westminster Corporation* v. *Gordon Hotels, Ld.*, [1906] 2 K. B. 39.
Affirmed by C. A. - [1907] 1 K. B. 910

—— *West Riding of Yorkshire Rivers Board* v. *Scarr End Mill Co.*, (1901) 65 J. P. 776.
Overruled by C. A. WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS - [1907] 1 K. B. 431

CASES—*continued.*

—— *Williams* v. *Swansea Harbour Trustees*, (1863) 14 C. B. (N.S.) 845.
Discussed by C. A. BEDE STEAMSHIP COMPANY *v.* RIVER WEAR COMMISSIONERS - - [1907] 1 K. B. 310

—— *Yorkshire (West Riding of) Rivers Board* v. *Scarr End Mill Co.*, (1901) 65 J. P. 776.
Overruled by C. A. WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS - [1907] 1 K. B. 431

—— *Young* v. *Kingston-on-Thames, Surbiton, New Malden, and Coombe Joint Burials Committee*, [1906] 1 K. B. 338.
Affirmed, but on different grounds, by C. A. - - - [1907] 1 K. B. 416

—— *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*, [1906] 1 K. B. 294.
Affirmed by C. A. - [1907] 1 K. B. 490

CATTLE—Contract by seller to insure cattle "against all risks"—Liability of seller *See* SALE OF GOODS. 1. 685

CERTIFICATE—Pawnbroker—Licence—"Successor" - - - - - 108
See PAWNBROKER.

CHARTERPARTY—Shipping.
See under SHIPPING.

CHEQUE—Gambling in a foreign country—Loan—Consideration - - - 746
See GAMING. 1.

CHURCHYARD—Poor rate, Liability to—Burial ground separated from church - 27
See RATES. 1.

COAL—Charterparty—Implied condition—Carriage of bunker coal intended for use on future voyage - - - - 846
See SHIPPING. 3.

—— Compensation—Mines—Coal required to be left unworked - - - - 402
See RAILWAY. 3.

COLLATERAL AGREEMENT—Lease under seal—Evidence, Inadmissibility of - 10
See LANDLORD AND TENANT. 2.

COMMISSION—Charterparty—Freight—Loss—Saving of charterparty hire - - 259
See INSURANCE (MARINE).

COMPANY—Libel—Publication to clerks of company exercising privilege - 371
See DEFAMATION. 2.

COMPENSATION—*Damage caused by exercise of Statutory Powers—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

The respondents, acting under the powers conferred by the Public Health Act, 1875, constructed an intercepting sewer, a pumping station, a sewage reservoir, and an outfall sewer, which were integral parts of, and together formed, one scheme of sewerage. The sewers were in part constructed on land the property of the claimant ; the pumping station and the reservoir were constructed on land the property of other persons. The present value of

COMPENSATION—*continued.*
certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes :—

Held, that as the acts of user, the contemplation of which caused the depreciation, would be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers" of the Public Health Act within the meaning of s. 308 of that Act, and consequently the claimant was not entitled to any compensation under that Act in respect of that depreciation. HORTON *v.* COLWYN BAY AND COLWYN DISTRICT COUNCIL **Bigham J. 14**

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

—— Licensing Acts.
See under LICENSING ACTS.

—— Mines—Coal required to be left unworked - - - - - - **402**
See RAILWAY. 3.

—— Waterworks clauses—Construction of statutes - - - - - - **205**
See WATERWORKS.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONSENT—River—Pollution—Summary proceedings by sanitary authority—Consent of Local Government Board **431**
See RIVER.

CONSIDERATION—Contract—Breach of duty to take care—Damages—Remoteness **483**
See CONTRACT.

—— Gambling in a foreign country—Loan—Cheque - - - - - - **746**
See GAMING. 1.

CONSTABLE.
See under POLICE.

CONTRACT—*Consideration—Breach of Duty to take care—Damages—Remoteness—Intervening Criminal Act of Third Party causing Loss.*

The defendants, newspaper proprietors, advertised in their newspapers that their city editor would answer inquiries from readers of the paper desiring financial advice. The plaintiff, a reader of the paper, wrote to the defendants' city editor asking him to recommend a "good stockbroker." The editor recommended one T., who, as he well knew, was an "outside broker," that is to say a person who transacted Stock Exchange business, but was not a member of the Stock Exchange. T. had for some months been employed by the defendants' editor to advise him on matters connected with the financial correspondence in his newspaper, and there was no evidence that the editor had any reason to suspect T.'s honesty. T. was, in fact, an undischarged bankrupt, but that fact was unknown to the editor, though he might easily have ascertained T.'s financial position if he had made inquiries. The plaintiff, in reliance on the editor's recommendation, sent money for investment to T., who immediately misappropriated it to his own use :—

Held : 1. That there was a contractual duty upon the defendants and their editor to take care that the person recommended as a broker to the plaintiff should answer the description of a good stockbroker, and that the editor in recommending T. had committed a breach of that duty ;

2. That T.'s misappropriation of the money, even if it amounted to a criminal offence, did not prevent the editor's breach of duty from being the cause of the plaintiff's loss, and that the defendants were liable to recoup that loss to the plaintiff. DE LA BERE *v.* PEARSON, LD. **Lord Alverstone C.J. 483**

—— Action founded on breach of contract—Service out of the jurisdiction - **145**
See COUNTY COURT. 2.

—— Affreightment—Bill of lading—Exception clause—Deviation - - - **660**
See SHIPPING. 8.

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

—— Lease under seal—Collateral agreement—Evidence, Inadmissibility of - - **10**
See LANDLORD AND TENANT. 2.

—— Sale of goods.
See under SALE OF GOODS.

—— Shipping.
See under SHIPPING.

—— Volunteer corps—Commanding officer—Liability on contract - - - **709**
See ARMY AND NAVY.

CONVICTION—Aiding and abetting—Evidence—Motor car - - - - - - **40**
See JUSTICES.

COSTS—Distress—Bailiff—Costs and charges—Agreement for extra remuneration **690**
See DISTRESS.

—— Distress—Charges—"Keeping possession" of goods seized - - - - **456**
See RATES. 2.

—— Joinder of causes of Action—Action of tort—Allegation of joint tort - - **264**
See PRACTICE. 5.

—— Light Railways Act, 1886—Order incorporating Lands Clauses Acts—Costs—Review of Taxation - - - **51**
See RAILWAY. 2.

—— Parliament—Registration—Nomination of clerk to county council as respondent
See PARLIAMENT. 2. **139**

—— Payment into Court—Recovery of less amount—Costs up to payment into Court—Payment out of amount recovered - - - - - - **71**
See PRACTICE. 3.

—— Public authority, Action against—Taxation - - - - - - - **393**
See COUNTY COURT. 1.

COSTS—*continued.*

—— Solicitor and client — Cash accounts — Draft bills of costs agreed—Bankruptcy of client—Trustee in bankruptcy - **155**
See BANKRUPTCY. 6.

—— Trial with jury—Separate issues—Form of judgment—"Event" - - - **656**
See PRACTICE. 4.

COUNSEL—Stamp duty—"Receipt"—Counsel's brief—Statement of fees - - **462**
See REVENUE. 6.

COUNTY COURT — *Costs — Taxation — Action against Public Authority—"Costs to be taxed as between Solicitor and Client"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 118—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *ss.* 1, 2.

Where in an action in a county court against a public authority for an act or neglect in the execution of its public duty a judgment is obtained by the defendant, the costs "to be taxed as between solicitor and client" given by s. 1 (*b*) of the Public Authorities Protection Act, 1893, must be taxed on the scale then in force in the county court, in accordance with s. 118 of the County Courts Act, 1888. TORY *v.* DORCHESTER CORPORATION - - **Div. Ct. 393**

2. —— *Practice — Prohibition — Alternative Remedy—Service out of the Jurisdiction—Action founded on Breach of Contract—Defendant resident in Scotland—County Court Rules*, 1903, *Order VII., rr.* 41 (*e*), 49.

The Court, in the exercise of its discretion, will prohibit, on the ground of absence of jurisdiction, further proceedings in a county court action founded on an alleged breach of contract within the district, where, the defendant being resident in Scotland, the county court judge has, contrary to Order VII., r. 41 (*e*), of the County Court Rules, 1903, made an order for the service of the summons on the defendant in Scotland, although there is an alternative remedy open to the defendant by way of an application to the county court judge, under Order VII., r. 49, to set aside the service or to discharge the order authorizing such service. CHANNEL COALING COMPANY *v.* ROSS - - - **Div. Ct. 145**

COUNTY COURT RULES, 1903, Order VII., rr. 41 (*e*), 49 - - - - **145**
See COUNTY COURT. 2.

COVENANT—Running with the land—Indemnity—Quiet enjoyment - - **612**
See LANDLORD AND TENANT. 1.

CREDITORS—Bankruptcy.
See under BANKRUPTCY.

CRIMINAL LAW — *Indictment — Bigamy — Second Marriage contracted Abroad—No averment that Accused was a British Subject—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

On a trial for bigamy where the second marriage has been contracted elsewhere than in England or Ireland it is not necessary that the indictment should contain an averment that the accused was a British subject. THE KING *v.* AUDLEY - - - - - **C. C. R. 383**

CRIMINAL LAW—*continued.*

2. —— *Obscene Libel—Publication—Aiding and Abetting—Advertisements in a Newspaper.*

The defendant inserted in a newspaper of which he was the editor advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received in return from the advertisers, who were foreigners resident abroad, obscene books and photographs. The defendant was tried on an indictment charging him with causing and procuring obscene books and photographs to be sold and published, and to be sent by post contrary to the Post Office (Protection) Act, 1884, s. 4. The defendant was convicted:—

Held, that the conviction was right. THE KING *v.* DE MARNY - - - **C. C. R. 388**

—— Intervening criminal act of third party causing loss - - - - - **483**
See CONTRACT.

CUSTOM—"Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade - - - - - **510**
See FACTOR.

CUSTOMS—Assay—Hall mark—Watch-cases—Foreign watches - - - - **95**
See PLATE.

DAMAGE AND DAMAGES—Highway—Subsidence caused by mining operations—Measure of damages - - - **78**
See HIGHWAY.

—— Intervening criminal act of third party causing loss - - - - - **483**
See CONTRACT.

—— Poor law—Negligence of officer—Liability of guardians to pauper inmate - **920**
See POOR LAW. 1.

—— Statutory powers, Damage caused by exercise of - - - - - - - **14**
See COMPENSATION.

DEATH—Arbitrator designated by name—Railway companies, difference between—Death of person designated - - **356**
See RAILWAY. 1.

—— Payment into Court without denial of liability—Action of libel—Death of plaintiff - - - - - **274**
See PRACTICE. 6.

—— Workmen's compensation—Death of sole dependant before award - - **219**
See EMPLOYER AND WORKMAN. 2.

DEFAMATION—*Libel — Practice — Pleading—Defence of Fair Comment—Particulars.*

The defence to an action for libel in a newspaper article that "in so far as the words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact; in so far as they consist of comment, the same were fair and bona fide comment upon a matter of public interest," is a defence of fair comment and not a justification.

The plaintiff advertised in a daily paper for a

DEFAMATION—*continued.*

partner with 250*l.* to complete the formation of a syndicate already registered. In reply to a letter of inquiry from a correspondent of the defendants, who were the proprietors of a different paper, the plaintiff forwarded particulars of the syndicate, together with reports and other documents relating to it. An article having been published in the defendants' paper, in which the particulars and documents supplied by the plaintiff were commented upon in a satirical vein, the plaintiff brought an action for libel, to which the defence set out above was (inter alia) pleaded, and particulars of the defence were given. The plaintiff applied for further and better particulars of the defence, asking for particulars as to whether the defendants alleged that any of the statements made in the particulars and documents sent by the plaintiff were untrue, and, if so, which of them :—

Held, that the defence being one of fair comment only, and no justification having been pleaded, the plaintiff was not entitled to the particulars sought. DIGBY *v.* FINANCIAL NEWS, LD. - - - - - - - **C. A. 502**

2. —— *Libel—Privileged Occasion—Publication to Clerks of Company exercising Privilege—Reasonable and ordinary Course of Business.*

Where a business communication containing defamatory statements concerning the plaintiff was made by the defendants, a company, to another company, on a privileged occasion, and, for the purpose of, and incidentally to, the making of the communication, the defamatory statements were, in the reasonable and ordinary course of business, published to clerks of the defendant company :—

Held, that the privileged occasion covered such a publication of those statements, which was therefore not actionable.

Boxsius v. *Goblet Frères*, [1894] 1 Q. B. 842, followed.

Pullman v. *Hill & Co.*, [1891] 1 Q. B. 524, discussed and distinguished. EDMONDSON *v.* BIRCH & CO., LD., AND HORNER - **C. A. 371**

—— Libel—Obscene libel—Publication—Aiding and abetting—Advertisements in a newspaper - - - - - - **388**
See CRIMINAL LAW. 2.

—— Libel—Payment into Court without denial of liability—Death of plaintiff - **274**
See PRACTICE. 6.

—— Libel—Writ—Service out of jurisdiction—Injunction—Judicial discretion - **853**
See PRACTICE. 7.

DEMURRAGE—Shipping.
See under SHIPPING.

DEVIATION—Ship—Contract of affreightment—Bill of lading—Exception clause
See SHIPPING. 8. **660**

DISCRETION—Writ—Service out of jurisdiction—Libel in newspaper—Injunction
See PRACTICE. 7. **853**

DISTRESS — *Bailiff — Costs and Charges—Agreement for extra Remuneration—Landlord and Tenant—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *ss.* 1, 2—*Law of Distress Amendment Act*, 1888 (51 *& 52 Vict. c.* 21).

A certificated bailiff who levies a distress for arrears of rent for an amount not exceeding 20*l.* is not prohibited by the Distress (Costs) Act, 1817, or the Law of Distress Amendment Act, 1888, or the rules thereunder, from making a special agreement with the landlord for extra remuneration beyond the costs and charges allowed under those Acts.

So *held* by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting). ROBSON *v.* BIGGAR **Div. Ct. 690**

—— Charges—"Keeping possession" of goods seized—"Man in possession" - **456**
See RATES. 2.

DOCK—Harbour Commissioners—Advertisement of depth of water on dock sill—Warranty of accessibility - - **310**

DRAINS.
See under SEWERS.

DUTY—Inland Revenue.
See under REVENUE.

EAST LONDON WATERWORKS ACT - **285**
See LONDON. 3.

ECCLESIASTICAL LAW—Burial ground—Fees to incumbent—Erection of monuments
See BURIAL. **416**

—— Income Tax—Easter offerings - **336**
See REVENUE. 3.

EMPLOYER AND WORKMAN—*Actress Engaged at Theatre—Master and Servant—Common Employment—Implied Undertaking of Risks of Employment—Negligence of Fellow Employee—Burden of Proof—Construction of Contract.*

The plaintiff was engaged by the defendants, a theatre company, to perform in the chorus in a pantomime. On the close of a performance, the plaintiff was, in leaving the stage, passing by a place where scene-shifters were shifting the scenery, when she was injured by something which fell on her head. At the trial of an action brought by the plaintiff against the defendants to recover damages in respect of the injury so occasioned to her, evidence was given for the plaintiff of the above facts, but there was, in effect, no further evidence to shew how, or by whose negligence, the accident was caused ;—

Held, that the case came within the rule that a person employed impliedly undertakes, as incidental to his employment, the risk of negligence on the part of a fellow employee engaged in the same employment, and that, inasmuch as the plaintiff had adduced no evidence to shew that the accident had been caused by the negligence of the defendant company, or of any person for whose negligence they would be responsible, the action was not maintainable.

A clause in a written contract of employment, providing that, notwithstanding anything contained in the Employers' Liability Act, 1880, the employer shall not be liable to the employee for injury occasioned to him through

EMPLOYER AND WORKMAN—*continued.*
the negligence of any person in the service of the employer, who is entrusted with superintendence, or to whose orders the employee is bound to conform, does not rebut the legal implication that the employee undertakes the risk of negligence by any fellow employee in the same employment. BURR *v.* THEATRE ROYAL, DRURY LANE, LD. - - **C. A. 544**

2. —— *Compensation—Dependant of deceased Workman—Claim of Compensation by Dependant—Death of sole Dependant before Award—Legal personal Representative of deceased Dependant—Survival of Right to Compensation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1; *s.* 7; *First Schedule*, *s.* 1 (*a*).

Where the sole dependant of a deceased workman, whose death was caused by an accident arising out of and in the course of his employment, made a claim against his employers for compensation under the Workmen's Compensation Act, 1897, but died before any award was made in respect of that claim:—

Held, that the right to compensation survived, and passed to the legal representative of the deceased dependant. DARLINGTON *v.* ROSCOE & SONS - - - - - **C. A. 219**

3. —— *Compensation—Stevedore—Unloading Ship—Defect in Ship's Tackle — Injury — Defective Plant—Employer's Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.

A stevedore's workman while engaged in unloading a ship was injured by the fall of a bale of cargo. Part of the tackle used for the unloading was supplied by the ship, and the accident was caused by a defect in this part of the tackle. The workman having brought an action in the county court against the stevedore for compensation under the Employers' Liability Act, 1880, the judge withdrew the case from the jury on the ground that the stevedore was not responsible for a defect in the ship's tackle, and his decision was affirmed by the Divisional Court:—

Held, that the stevedore owed a duty to the workman to take reasonable care in seeing that this tackle was in a proper condition, and that the action must be sent back for a new trial. BIDDLE *v.* HART - - - - - **C. A. 649**

4. —— *Compensation—"Workman"—Skilled Expert in Business of Employer—Manual Labour incident to Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A man, who had taken a degree in science, entered the employment of a dye and chemical manufacturing company, under a written agreement for five years' service, and upon terms with regard to salary, commission on profits of inventions or improvements in manufacture discovered by him, restrictions as to employment after the termination of his engagement, and disclosure of matters relating to the business of the company and his own researches, applicable to employment as a skilled expert in the business of his employers. His employment

EMPLOYER AND WORKMAN—*continued.*
involved manual labour on his part. In the course of his employment he met with an accident which caused his death. On an application under the Workmen's Compensation Act, 1897, an award of compensation was made by a county court judge, on the ground that the fact that the man did manual labour brought the case within the Act. On appeal:—

Held, by Collins M.R. and Cozens-Hardy L J. (Farwell L.J. dissenting), that the governing factor in determining whether the man was a workman within the meaning of the Act was the question what he was employed to do, and that the judge misdirected himself by not taking into consideration the terms of the employment as disclosed in the agreement, and in treating the performance of manual labour in the discharge of his duties as conclusive that the man was a workman within the meaning of the Act.

Simpson v. *Ebbw Vale Steel, Iron and Coal Co.*, [1905] 1 K. B. 453, applied. BAGNALL *v.* LEVINSTEIN, LD. - - - - - **C. A. 531**

5. —— *Motor Omnibus, Driver of—Master and Servant—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Otherwise engaged in manual labour.*"

The driver of a motor omnibus who has, when out with the omnibus, to do such necessary repairs to it as he is able to do, is a person "otherwise engaged in manual labour" within s. 10 of the Employers and Workmen Act, 1875, and is, therefore, entitled to the benefit of the Employers' Liability Act, 1880.

Cook v. *North Metropolitan Tramways Co.*, (1887) 18 Q. B. D. 683, distinguished. SMITH *v.* ASSOCIATED OMNIBUS COMPANY **Div. Ct. 916**

EMPLOYERS' LIABILITY ACT.
See under EMPLOYER AND WORKMAN.

ESTATE DUTY—Revenue.
See under REVENUE.

ESTOPPEL — Promissory note — Signature in blank—Authority to fill up note to limited amount—Excess of authority
See PROMISSORY NOTE. **794**

—— Stock—Transfer in books of Bank of England — Personation of holder — Effect of transfer - - - **889**
See INDIA STOCK.

EVIDENCE—Aiding and abetting, Conviction for—Motor car - - - - - **40**
See JUSTICES.

—— False imprisonment.
See under FALSE IMPRISONMENT.

—— Fugitive offender—Committal by magistrate for return to colony - - **696**
See JURISDICTION.

—— Inadmissibility—Lease under seal—Collateral agreement - - - **10**
See LANDLORD AND TENANT. 2.

—— Railway — Rateable value — Link line—Admissibility of matters outside the parish - - - - - - - **717**
See RATES. 4.

EXCISE LICENCE.
See under LICENSING ACTS.

FACTOR—"*Mercantile Agent*"—*Authority to Pledge, Extent of—Custom of Particular Trade — Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

The authority given by s. 2 of the Factors Act, 1889, to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in a particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them.

Quære, whether the fact that possession of the goods is obtained by a mercantile agent from his employer by means amounting to larceny by a trick operates to deprive a subsequent bona fide pledgee of the goods of the protection of s. 2 of the Factors Act, 1889. See *Oppenheimer* v. *Frazer and Wyatt*, Channell J., [1907] 1 K. B. 519. OPPENHEIMER *v.* ATTENBOROUGH & SON - - - **Channell J. 510**

—— Sale of goods.
See under SALE OF GOODS.

FALSE IMPRISONMENT—*Signing the Charge Sheet—Effect of, Standing alone — Absence of Evidence of causing Imprisonment.*

The signing of a charge sheet, standing alone, is not evidence of anything directly causing the imprisonment of the person charged, and will not support an action for false imprisonment against the person who signs. SEWELL *v.* NATIONAL TELEPHONE COMPANY, LD. **C. A. 557**

FARM—Poor rate—Assessment—Sewage farm
See RATES. 5. **630**

FEES—Incumbent, fees to—Erection of monuments—Consecration - - - **416**
See BURIAL.

FINANCE ACTS.
See under REVENUE.

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREIGN JUDGMENT—*Partnership—Colonial Firm—Real Estate—Partner resident in England —Agreement to submit to Jurisdiction.*

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into a partnership for the working of a gold mine, owned by the partnership, in that Colony. In 1899 the defendant left Western Australia permanently and came to reside in England. In 1901 the plaintiffs, being the partners other than the defendant, commenced an action in the Supreme Court of Western Australia against the defendant claiming a decree for the dissolution of the partnership, the sale of the mine, and the taking of partnership accounts. The writ was served on the defendant in England, but he did not enter an appearance or take any step to defend the action. The Court decreed the dissolution of the partnership and the sale of the mine, and on taking the account a sum was certified to be due from the

FOREIGN JUDGMENT—*continued.*

partnership. The plaintiffs paid the sum, and sought to recover the share due from the defendant in an action on the decree and certificate :—

Held, that the defendant, by entering into a partnership in Western Australia relating to real estate in the Colony, had by implication agreed to submit to the jurisdiction of the Courts of Western Australia as to disputes arising during the continuance and on the termination of the partnership, and that the decree was, therefore, binding on him.

Copin v. *Adamson*, (1874) L. R. 9 Ex. 345 ; 1 Ex. D. 17, applied.

Quære, whether the assignment by a partner in a firm, consisting of more than two members, of his share in it to another partner operates as a dissolution of the partnership. EMANUEL *v.* SYMON - - - - **Channell J. 235**

FOREIGN WATCHES — Assay — Hall mark—Watch-cases - - - - **95**
See PLATE.

FRANCHISE.
See under PARLIAMENT.

FUGITIVE OFFENDER—Committal by magistrate for return to Colony—Evidence
See JURISDICTION. **696**

GAMING — *Foreign Country, Gambling in a — Gaming and Wagering—Loan—Cheque — Consideration* — "*Deemed to be illegal*" — *Gaming Act*, 1710 (9 *Anne, c.* 14), *s.* 1 —*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1.

The defendant gave to the plaintiff in Algiers a cheque drawn by him on an English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to play at baccarat in a club at Algiers, and, as to the balance, to be applied by the plaintiff in discharging debts incurred by the defendant when playing at baccarat in the club. The consideration for the cheque was legal according to the law of France. In an action on the cheque :—

Held, by Collins M.R. and Cozens-Hardy L.J. (Fletcher Moulton L.J. dissenting), that, inasmuch as the transaction was governed by English law, the cheque must be deemed to have been given for an illegal consideration within s. 1 of the Gaming Act, 1835, and that the action was, therefore, not maintainable.

Robinson v. *Bland*, (1760) 1 W. Bl. 234, 256 ; 2 Burr. 1077, followed.

King v. *Kemp*, (1863) 8 L. T. 255, not followed. MOULIS *v.* OWEN - - - **C. A. 746**

2. —— *Lottery—Gratuitous Distribution by Newspaper Proprietors of Medals bearing Numbers—Notification of Winning Numbers in Newspaper—Possibility of obtaining Prize without actual Purchase of Chance—Gaming Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The proprietors of a weekly newspaper caused medals to be distributed gratuitously among members of the public ; each medal bore a distinctive number and the words, "Keep this, it may be worth 100*l.* See the *Weekly Telegraph* to-day" ; the winning numbers, which were arbitrarily selected by the newspaper proprietors

GAMING—*continued.*
and were unknown to the distributors, were published weekly in the newspaper. There were no coupons, and it was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize; information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the scheme was to induce persons to inspect or buy the paper, and the circulation in fact increased considerably during the progress of the scheme:—

Held that, although it was possible for an individual holder of a medal to obtain a prize without paying anything for his chance, the medal-holders as a body collectively contributed sums of money to the fund out of which the money came for the prizes, and that the scheme was a lottery within s. 2 of the Gaming Act, 1802. WILLIS *v.* YOUNG AND STEMBRIDGE **Div. Ct. 448**

3. —— *Lottery, Keeping a Place for a—User on one Occasion only—Gaming Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2.

The use of a room on one occasion for the drawing of tickets in a lottery is not an offence under s. 2 of the Gaming Act, 1802, which forbids the keeping of any place for the purpose of a lottery. MARTIN *v.* BENJAMIN **Div. Ct. 64**

GARNISHEE—Order nisi — Payment by garnishee to judgment creditor—Bankruptcy of judgment debtor - **623**
See BANKRUPTCY. 3.

GUARDIANS—Poor law
See under POOR LAW.

HALL MARK — Assay — Watch-cases — Foreign watches - - - - - - **95**
See PLATE.

HARBOUR — *Ship — Harbour Commissioners — Dock—Advertisement of Depth of Water on Dock Sill—Obligation to use reasonable care to provide for ingress and egress of Ships—Warranty of Accessibility.*

Where harbour commissioners, who are authorized and required by statute to execute works of improvement and maintenance in a harbour, and are empowered to make and maintain docks in connection therewith, and to take harbour and dock tolls and dues in respect of the use of the harbour and docks, advertise that there is a certain depth of water on the sill of a dock belonging to them, they thereby incur, towards shipowners who send their ships to the dock on the faith of that advertisement, the obligation of at least using reasonable care to provide for an access from and to the sea to and from the dock with a sufficient depth of water under the normal conditions of the time of the year for all ships of such draught as to enable them to pass over the dock sill.

Therefore, where in such a case the commissioners had not used such care, but had allowed silt to accumulate at the entrance of their harbour, and a ship had consequently been detained for four days in the dock:—

Held, that the commissioners were liable to the shipowners in damages for the detention of their ship.

Semble, a warranty of the accessibility of a dock may be implied from such an advertisement, for ships of such draught, as before mentioned, so far as that accessibility depends on the condition of places within the harbour works or so situated that their condition is within the commissioners' powers of inspection and control.

Williams v. *Swansea Harbour Trustees*, (1863) 14 C. B. (N.S.) 845, discussed. BEDE STEAMSHIP COMPANY *v.* RIVER WEAR COMMISSIONERS **C. A. 310**

"HEREDITAMENT" — Income tax — Sewer — Vested in local authority - - **490**
See REVENUE.

HIGHWAY—*Subsidence caused by Mining Operations—Action against Wrong-doer—Measure of Damages—Local Government—Urban Sanitary Authority—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 149—*Highways and Locomotives (Amendment) Act*, 1878 (41 *&* 42 *Vict. c.* 77) *ss.* 10, 27.

The defendants were the owners of a mine extending under a highway which was vested, under s. 149 of the Public Health Act, 1875, in the plaintiffs as the urban sanitary authority. While lawfully working the mine the defendants let down the surface of the highway, which the plaintiffs, acting in good faith and on the opinion of skilled advisers, restored to its former level. In an action to recover damages for the injury to the highway:—

Held, that the plaintiffs, in carrying out their statutory obligation to maintain the highway, were not restricted to making a road as commodious to the public as the original road, but were entitled to restore the highway to its original level, and that the cost of so doing was the measure of the damages recoverable from the defendants.

Judgment of Jelf J., [1905] 2 K. B. 823, reversed. WEDNESBURY CORPORATION *v.* LODGE HOLES COLLIERY COMPANY, LD. **C. A. 78**

HOLIDAYS — Ship — Demurrage—Lay days — Sundays and holidays excepted **783, 787, n., 788, n.**
See SHIPPING. 5—7.

HOTEL—Compensation fund—Relief from maximum charge - - - - - **298**
See LICENSING ACTS. 3.
—— Removal of refuse—Trade refuse—Public Health (London) Act - - - **910**
See LONDON. 2.

IMPRISONMENT—False imprisonment.
See under FALSE IMPRISONMENT.

INCOME TAX.
See under REVENUE.

INCUMBENT—Fees to—Burial ground—Erection of monuments - - - **416**
See BURIAL.

INDEMNITY—Covenant running with the land —Quiet enjoyment - - - 612
See LANDLORD AND TENANT. 1.

—— Ship—Duty of charterer to present proper bill of lading—Variance between charterparty and bill of lading - - 809
See SHIPPING. 1.

—— Stockbroker, Liability of, to indemnify bank—Personation of holder—Identification of transferor by stockbroker.
See INDIA STOCK. 889

INDIA STOCK—*Transfer in Books of Bank of England—Personation of Holder—Identification of Transferor by Stockbroker—Effect of Transfer—Estoppel—Obligation of Bank to replace Stock in name of true Holder—Liability of Stockbroker to indemnify Bank.*

Under the statutes authorizing the issue of India Stock, transfers of that stock are invalid unless they are entered and registered in a book kept at the Bank of England for that purpose and are signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party desiring to transfer India Stock is the person entitled to it, it is the custom of the Bank to keep a list of stockbrokers whose identification of intending transferors will be accepted by them. The defendant was a stockbroker whose name was on that list. A woman fraudulently personated another who was a registered holder of India Stock, and, having procured herself to be introduced to the defendant as the holder, instructed him to procure a transfer. The defendant accordingly sent to the Bank a "ticket"—that is, a statement of the names of the transferor and transferee, the nature of the stock, and the amount to be transferred—from which ticket the Bank prepared a transfer in the transfer-book, and the personator attended and forged the holder's name in the book, the defendant identifying her as being the holder. The stock was subsequently transferred to G., who purchased it bona fide and for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register, and the Bank in satisfaction of that claim purchased stock of a like amount and transferred it into her name. The Bank then sued the defendant as upon the breach of a warranty of the identity of the transferor :—

Held, (1.) that there was evidence upon which the Court could find, and that the proper inference of fact was, that the defendant requested the plaintiffs to permit the entry and registration of the forged transfer, a fact which, upon the authority of *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, involved the legal consequence that the defendant contracted to indemnify the plaintiffs against any liability resulting from registration ; (2.) that, as G. had purchased bona fide and for value upon the faith of the preceding transfer which the plaintiffs had permitted, the plaintiffs were estopped from treating the transfer to G. as a nullity and erasing his name from the register, and could only replace the original stockholder's name upon the register by purchasing other stock for the purpose, and that the defendant was consequently bound to make good to the plaintiffs the loss to which

INDIA STOCK—*continued.*

they had been put in so purchasing the stock. BANK OF ENGLAND *v.* CUTLER
A. T. Lawrence J. 889

INDICTMENT—Bigamy—Second marriage contracted abroad—No averment that accused was a British subject - 383
See CRIMINAL LAW. 1.

INJUNCTION—Libel in newspaper—Writ—Service out of jurisdiction—Judicial discretion - - - - - 853
See PRACTICE. 7.

INLAND REVENUE.
See under REVENUE.

INSURANCE—Contract by seller to insure cattle against all risks" — Liability of seller - - - - - - - 685
See SALE OF GOODS. 1.

INSURANCE, LIFE—Mortgage—Repayment of premiums to volunteer out of policy monies—Duty of trustee - - 865
See BANKRUPTCY. 4.

INSURANCE (MARINE) — *Charterparty — Freight—Loss—Saving of Charterparty Hire—Commission.*

The rules established in *Palmer* v. *Blackburn*, (1822) 1 Bing. 61, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net, amount of the freight, applies not only to cases where the assured is the owner, but also where he is the charterer of the ship.

The plaintiffs chartered a ship for twelve months and effected an open policy on freight and/or chartered freight. During the currency of the policy the ship was sub-chartered from the plaintiffs for a voyage. The ship stranded through perils insured against, and the plaintiffs suffered a loss of part of the freight which they would otherwise have earned under the sub-charterparty, but they were saved the expense of two days' charterparty hire. The plaintiffs had paid a commission on obtaining the sub-charterparty :—

Held, that the hire saved could not be deducted from the amount recoverable on the policy ;

Held, also, that, in the absence of any evidence of custom, the amount of the commission could not be added to the amount of the loss.

Forbes v. *Aspinall*, (1811) 13 East, 323, discussed. UNITED STATES SHIPPING COMPANY *v.* EMPRESS ASSURANCE CORPORATION
Channell J. 259

—— Mortgage of ship together with policies of insurance thereon—Repairs by mortgagor - - - - - - - 116
See SHIPPING. 10.

—— Ship—Contract of carriage—Liability of shipowner—Unseaworthiness - 769
See SHIPPING. 9.

ISSUES—Costs — Trial with jury — Separate issues—Form of judgment "Event."
See PRACTICE. 4. 656

JOINDER—Causes of action—Action of tort—Allegation of joint tort—Costs - **264**
See PRACTICE. 5.

JUDGMENT—Costs—Trial with jury—Separate issues—Form of judgment—"Event." *See* PRACTICE. 4. **656**

—— Final judgment — Bankruptcy notice — Enforcing award—Jurisdiction - **478**
See BANKRUPTCY. 1.

—— Foreign judgment—Partnership—Colonial firm—Partner resident in England—Agreement to submit to jurisdiction. *See* FOREIGN JUDGMENT. **235**

JUDGMENT CREDITOR—Payment by garnishee to—Garnishee order nisi—Bankruptcy of judgment debtor - - **623**
See BANKRUPTCY. 3.

JURISDICTION—*Fugitive Offender—Committal by Magistrate for return to Colony—Evidence of Crime punishable in Colony by Imprisonment with Hard Labour for Twelve Months or more—Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69), s. 9.

In order that a magistrate may have jurisdiction under s. 9 of the Fugitive Offenders Act, 1881, to commit a fugitive offender for return to a Colony, it is necessary that there should be evidence before him that the offender has committed an offence, punishable according to the law of the Colony in which it is alleged to have been committed by imprisonment with hard labour for a term of twelve months or more. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* PERCIVAL - - **Div. Ct. 696**

—— Bankruptcy notice — Final judgment — Enforcing award - - - - **478**
See BANKRUPTCY. 1.

—— Foreign judgment—Partnership—Colonial firm—Agreement to submit to jurisdiction - - - - - - - **225**
See FOREIGN JUDGMENT.

—— Metropolitan police magistrate, Jurisdiction of—Carriage road—Recovery of expenses - - - - - - **881**
See LONDON. 1.

—— Service out of jurisdiction—Writ—Libel in newspaper—Judicial discretion - **853**
See PRACTICE. 1.

—— Summary jurisdiction—Motor car—Conviction for aiding and abetting — Evidence - - - - - - **40**
See JUSTICES.

—— Summary jurisdiction—Removal of refuse *See* LONDON. 2. **910**

—— Trade union—Absence of provision in rules for levying contributions—Jurisdiction of Court - - - - - - **361**
See TRADE UNION.

JUSTICES — *Offence punishable upon Summary Conviction — Information — Principal Offender—Conviction for Aiding and Abetting—Evidence—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Motor Car Act*, 1903 (3 Edw. 7, *c.* 36), *s.* 1.

A person who has aided and abetted the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed the offence as principal offender.

Benford v. *Sims*, [1898] 2 Q. B. 641, followed.

The appellant appealed to quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car. The quarter sessions, without deciding whether the appellant was himself driving the car, dismissed the appeal, finding as facts that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could, and ought to, have prevented it.

Held, affirming the decision of quarter sessions, that there was evidence on which the appellant could be convicted of aiding and abetting the commission of the offence. DU CROS *v.* LAMBOURNE - - **Div. Ct. 40**

—— Bigamy — Indictment — Second marriage contracted abroad—No averment that accused was a British subject - **383**
See CRIMINAL LAW. 1.

—— Carriage road — Recovery of expenses — Metropolitan police magistrate, Jurisdiction of - - - - - - **881**
See LONDON. 1.

—— Constable—Obstructing police in execution of duty—Giving warning of "police trap" - - - - - - - **59**
See POLICE.

—— Distress — Bailiff — Costs and charges — Agreement for extra remuneration **690**
See DISTRESS.

—— Fugitive offender—Committal by magistrate for return to Colony - - **696**
See JURISDICTION.

—— Gaming and wagering.
See under GAMING.

—— Licensing Acts.
See under LICENSING ACTS.

—— Lottery.
See under GAMING.

—— Metropolitan police magistrate, Jurisdiction of—Carriage road — Recovery of expenses - - - - - - **881**
See LONDON. 1.

—— Obscene libel — Publication—Aiding and abetting—Advertisements in a newspaper - - - - - - - **388**
See CRIMINAL LAW. 2.

—— Pawnbroker.
See under PAWNBROKER.

—— Poor law.
See under POOR LAW.

—— Poor Rates.
See under RATES.

JUSTICES—*continued.*

—— Rates.
See under RATES.

—— Removal of refuse—Hotel—Decision of Petty Sessional Court "shall be final"—Appeal by special case - - **910**
See LONDON. 2.

—— Sale of food and drugs—Rum diluted with water - - - - - - **278**
See ADULTERATION.

—— Sewer—"Single private drain"—Pipe receiving drainage from sewer - **182**
See SEWERS.

—— Water—East London Waterworks Act—"Premises" - - - - **285**
See LONDON. 3.

LANDLORD AND TENANT—*Covenant running with the Land—Covenant by Lessor to perform Covenants of Head Lease and in default to indemnify Lessee—Collateral Covenant—Enlargement of Covenant for Quiet Enjoyment.*

Where an underlease contains a qualified covenant for quiet enjoyment by the underlessor with the underlessee, i.e., that the underlessee may quietly enjoy the premises free from interruption by the underlessor or any other person claiming under or in trust for him, and the underlease also contains a covenant that the underlessor will perform the covenants of the superior lease so far as they relate to premises included in the superior lease, but not demised by the underlease, the latter covenant does not enlarge the covenant for quiet enjoyment into an absolute covenant, so as to make the underlessor liable to an action at the suit of the underlessee for damages for a lawful disturbance of the underlessee by the superior landlord.

A covenant by the underlessor with the underlessee that the underlessor will perform the covenants and conditions of the superior lease so far as they relate to premises included in the superior lease but not demised by the underlease, and will keep the underlessee indemnified from all loss he shall suffer from the breach thereof, does not run with the land so as to bind the assignee of the underlessor, even though the underlessor covenants for himself, his heirs, executors, administrators and assigns, and the underlease contains a proviso that the covenants and indemnity on the part of the underlessor were entered into and given by him with the intention of binding such underlessor, his real and personal representatives, only whilst he and they continued to hold the reversion expectant on the term granted by the underlease, and of binding so far as could be any other person or persons for the time being entitled to that reversion; inasmuch as the covenant to perform the covenants in the superior lease relating to premises not demised by the underlease is only a collateral covenant, and the covenant to indemnify is personal. DEWAR *v.* GOODMAN **Jelf J. 612**

2. —— *Lease under Seal—Covenant to pay Rent in Advance—Antecedent Agreement to take Bill for Rent—Contract—Evidence, Inadmissibility of—Collateral Agreement.*

Where, in an action by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of the rent quarterly in advance, the defendant set up by way of defence that by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease the plaintiff agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, and that the defendant had tendered such a bill to the plaintiff in respect of the rent sued for, which the plaintiff refused to take:—

Held, that evidence of such an agreement as alleged was inadmissible. HENDERSON *v.* ARTHUR - - - - - - **C. A. 10**

LANDLORD AND TENANT—*continued.*

—— Distress—Bailiff—Costs and charges—Agreement for extra remuneration **690**
See DISTRESS.

LANDS CLAUSES ACTS—Costs—Review of taxation—Light Railways Act, 1886 **51**
See RAILWAY. 2.

LARCENY—Sale of goods—Possession obtained by larceny by a trick—Mercantile agent - - - - - - **519**
See SALE OF GOODS. 2.

LEASE.
See under LANDLORD AND TENANT.

LIBEL.
See under DEFAMATION.

LICENCE—Pawnbroker—Certificate—"Successor" - - - - - **108**
See PAWNBROKER.

LICENSING ACTS—*Compensation Charge—Deduction of Amount paid by Licence-holder from Rent—Income Tax—Right of Tenant to Deduct Income Tax paid on behalf of Landlord—"Rent payable"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Sched. A, No. IV., Ninth Rule—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3.

The right given by s. 3 of the Licensing Act, 1904, to a licence-holder to deduct from his rent a proportion of the amount paid by him in respect of compensation charges does not affect the "rent payable" to the landlord within the meaning of the Income Tax Act, 1842, and therefore the tenant of licensed premises is entitled to deduct from the next payment of rent the tax that he has paid on the total rent payable by him to his landlord, although he has not paid to the landlord the whole amount of that rent, but has deducted from it a proportion of the compensation charge in accordance with the provisions of the Licensing Act, 1904. HANCOCK & CO. *v.* GILLARD - **Bigham J. 47**

2. —— *Compensation Charge—Year for which levied—Excise Licence—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-ss.* 1, 2.

The compensation charge imposed in each year in respect of a renewed licence by quarter sessions under s. 3, sub-s. 1, of the Licensing Act, 1904, is imposed in respect of the period from April 5 of the year in which it is payable until April 5 of the succeeding year. HORTON *v.* PENN - - - - - - **Div. Ct. 561**

LICENSING ACTS—*continued.*

3. —— *Compensation Fund — Relief from Maximum Charge—Hotel—Premises used for a Purpose to which the holding of a Licence is Auxiliary—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *Sched. I.*

By s. 43 of the Inland Revenue Act, 1880, the duties payable on licences to retailers of spirits are fixed, and by sub-s. 4, in the case of premises of the value of 50*l.*, which are structurally adapted for and mainly used as an inn or hotel for the reception of guests and travellers, the duty is not to exceed 20*l.*, but this relief is not to be given if any portion of the premises is set apart and used as an ordinary public-house and the annual value of that portion exceeds 25*l.* By Sched I. of the Licensing Act, 1904, the maximum rate of charge upon licensed premises as a contribution to the compensation fund for the extinction of licences is fixed, and relief is given in the case of a hotel or other premises to which s. 43, sub-s. 4, of the Act of 1880 applies, and also in the case of any licensed premises certified by the licensing justices to be used " . . . . for any other purpose to which the holding of a licence is merely auxiliary " :—

Held, that the holder of the licence of a hotel of the annual value of 450*l.*, a portion of which, exceeding 25*l.* in annual value, was set apart as a public bar and used as an ordinary public-house, was not entitled to relief from the maximum charge to the compensation fund, as the holding of a licence was not merely auxiliary to the business of such a hotel. THE KING *v.* CARTER - - - - - - **Div. Ct. 298**

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT DUES — Tonnage — Deck cargo—Coal carried on deck for use on foreign voyage - - - - - - **604**
See SHIPPING. 13.

LIGHT RAILWAYS.
See under RAILWAY.

LOCAL GOVERNMENT—Highway—Subsidence caused by mining operations—Measure of damages - - - - - - **78**
See HIGHWAY.

—— Rates.
See under RATES.

—— Sewers.
See under SEWERS.

LOCAL GOVERNMENT BOARD — Consent — River—Pollution — Summary proceedings by sanitary authority - - **431**
See RIVER.

LONDON—*Carriage Road not Repairable by Inhabitants at large—Repairs by Local Authority—Recovery of Expenses — Jurisdiction of Metropolitan Police Magistrate—" Court of Competent Jurisdiction " — Metropolis Management Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 66), *s* 3.

A metropolitan police magistrate is a " Court of competent jurisdiction " within the meaning of s. 3 of the Metropolis Management Act, 1890, and has jurisdiction to entertain proceedings for the recovery from the frontagers of the expenses

LONDON—*continued.*

of repairs done by a borough council under the provisions of that section to a carriage road which is not repairable by the inhabitants at large. THE KING *v.* GARRETT- - **C. A. 881**

2. —— *Removal of Refuse — Hotel — Trade Refuse—Dispute between Occupier and Sanitary Authority—Decision of Petty Sessional Court " shall be final "—Appeal by Special Case—Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33—*Metropolis Management Acts—Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 33, *sub-s.* 2.

In any dispute between occupier and the sanitary authority as to what is considered trade refuse, the decision of the magistrate under s. 33, sub-s. 2, of the Public Health (London) Act, 1891, is final, and no appeal will lie to the High Court, notwithstanding the general provisions of the Summary Jurisdiction Act, 1879, s. 33, giving any person aggrieved by a decision of the magistrate on a question of law the right to require a case to be stated for the opinion of the High Court.

Reg. v. *Bridge*, (1890) 24 Q. B. D. 609, distinguished.

Per Buckley L.J. : Whether in this case it is still competent for a magistrate to give his decision subject to a case for the opinion of the High Court, *quære?*

The decision of the Divisional Court, [1906] 2 K. B. 39, affirmed. WESTMINSTER CORPORATION *v.* GORDON HOTELS, LD. - - **C. A. 910**

3. —— *Water—Supply of Water by Meter—" Premises "—Land used for Building Operations—Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 17), *s.* 43—*East London Waterworks Act*, 1853 (16 *&* 17 *Vict. c. clxvi.*), *s.* 79.

The word " premises " in s. 79 of the East London Waterworks Act, 1853, does not include land upon which the owner and occupier proposes to conduct building operations. Therefore the East London Waterworks Company are not liable to conviction under s. 43 of the Waterworks Clauses Act, 1847, and s. 79 of the Act of 1853, for neglecting to afford to the owner or occupier of the land a supply of water by meter for purposes other than the purposes in respect of which water rates are, by the Act of 1853, provided or limited. METROPOLITAN WATER BOARD *v.* PAYNE - - - **Div. Ct. 285**

LOTTERY—Gratuitous distribution by newspaper proprietors of medals bearing numbers
See GAMING. 2. **448**

—— Keeping a place for a lottery—User on one occasion only - - - - - **64**
See GAMING. 3.

MAGISTRATE.
See under JUSTICES.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINES—Compensation—Coal required to be left unworked - - - - - 402
See RAILWAY. 3.

—— Highway—Subsidence caused by mining operations—Measure of damages - 78
See HIGHWAY.

MISTAKE—Appealing, Time for—Mistake as to effect of rule—Discretion of Court 1
See PRACTICE. 2.

MORTGAGE—Costs—Mortgage to secure agreed balance of stated account—Bankruptcy of client - - - - - - 155
See BANKRUPTCY. 6.

—— Insurance—Repayment of premiums to volunteer out of policy moneys—Duty of trustee - - - - - - 865
See BANKRUPTCY. 4.

—— Ship (mortgage of) together with policies of insurance thereon — Repairs by mortgagor - - - - - - 116
See SHIPPING. 10.

MOTOR CAR—Conviction for aiding and abetting —Evidence - - - - - - 40
See JUSTICES.

—— Obstructing police in execution of duty—Giving warning of "police trap" 59
See POLICE.

MOTOR OMNIBUS — Driver of—"Otherwise engaged in manual labour"—Master and servant - - - - - - 916
See EMPLOYER AND WORKMAN. 5.

NEGLIGENCE—Actress employed at theatre—Negligence of fellow employee—Construction of contract - - - 544
See EMPLOYER AND WORKMAN. 1.

—— Guardians—Negligence of officer—Liability of guardians to pauper inmate - 920
See POOR LAW. 1.

NEGOTIABLE INSTRUMENT—Promissory note
See under PROMISSORY NOTE.

NEWSPAPER—Advertisement in a—Obscene libel — Publication — Aiding and abetting - - - - - - 388
See CRIMINAL LAW. 2.

—— Libel in newspaper—Writ—Service out of jurisdiction—Injunction—Judicial Discretion - - - - - - 853
See PRACTICE. 7.

NOTICE—Bankruptcy notice—Final judgment Enforcing award - - - - 478
See BANKRUPTCY. 1.

—— River—Pollution — Summary proceedings by sanitary authority—Consent of Local Government Board - - - 431
See RIVER.

OBSTRUCTING POLICE—In execution of duty —Giving warning of "police trap" 59
See POLICE.

OCCUPATION—Rates — Warehouse — Intention to occupy - - - - - - 192
See RATES. 3.

OFFENCES AGAINST THE PERSON ACT—Indictment—Bigamy—Second marriage contracted abroad—No averment that accused was a "British subject" - 383
See CRIMINAL LAW. 1.

OMNIBUS—Driver of motor omnibus—"Otherwise engaged in manual labour"—Master and servant - - - 916
See EMPLOYER AND WORKMAN. 5.

ORDER AND DISPOSITION—Goods in, of bankrupt—Reputed ownership—Claim by true owner to prove for value of goods - - - - - - 397
See BANKRUPTCY. 5.

PARLIAMENT — *Franchise — Dwelling-house "Inhabitant Occupier" or "Lodger"—Resident Landlord—Prima facie Proof—Rebutting evidence—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3. *sub-s.* 2; *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5; *s.* 28, *sub-ss.* 10, 11.

At a court held by a revising barrister the appellant claimed to be entitled to the franchise as an "inhabitant occupier" under s. 3, sub-s. 2, of the Representation of the People Act, 1867, and s. 5 of the Parliamentary and Municipal Registration Act, 1878.

The revising barrister found—

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(3.) That such landlord was rated for the entire house as a separate tenement:—

Held, that these facts constituted evidence upon which the revising barrister could decide that there was prima facie proof of a ground of objection that the appellant was not an inhabitant occupier as tenant of a dwelling-house within the meaning of the Acts.

The appellant had also made a claim to be entitled to the franchise in respect of the lodger qualification. The revising barrister considered that that fact strengthened to some extent the prima facie proof of the ground of objection. In order to rebut the prima facie proof of the ground of objection the appellant produced a document signed by himself and his landlord containing (inter alia) a statement to the effect that the landlord had no control whatever over the appellants' rooms; but the revising barrister did not accept the statements in the documents as facts, and held that the document was not sufficient to rebut the prima facie proof of the ground of objection that the appellant was not an inhabitant occupier:—

Held, that the revising barrister was justified in coming to that conclusion. DOUGLAS *v.* SMITH - - - - - - **Div. Ct. 126**

PARLIAMENT—*continued.*

2. —— *Registration — Service Franchise — Inhabitant Occupier — Compulsory Absence — "Office, Service, or Employment"—Appeal from Decision of Revising Barrister—Nomination of Clerk to County Council as Respondent—Costs—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26) *s.* 38—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Electoral Disabilities Removal Act*, 1891 (54 & 55 *Vict. c.* 11), *s.* 2.

A break of inhabitancy where the occupier has not the legal right to return has the same effect in disqualifying the occupier for the service franchise as for the ordinary dwelling-house franchise.

The voter, a coachman, occupied a dwelling-house by reason of his employment, but was compulsorily absent from the house for more than four months during the qualifying period. His wife and family resided with him during the qualifying period, but they might have been left at the dwelling-house if he had wished during the period of his absence :—

Held, that he was not entitled to be registered on the list of voters for the parish, inasmuch as he was placed in the same position as an inhabitant occupier by s. 3 of the Representation of the People Act, 1884, and s. 2 of the Electoral Disabilities Act, 1891, could only protect him in respect of compulsory absence for not more than four months during the qualifying period.

Where the clerk to a county council is nominated under s. 38 of the Parliamentary and Municipal Registration Act, 1878, by a revising barrister as respondent to an appeal from his decision, the High Court has jurisdiction under the section to grant the appellant, if successful, his costs, even though the respondent does not appear. LARCOMBE *v.* SIMEY - **Div. Ct. 139**

PARTICULARS—Libel—Defence of fair comment—Practice—Pleading - - **502**
See DEFAMATION. 1.

PARTIES—Intervening criminal act of third party causing loss - - - **483**
See CONTRACT.

PARTNERSHIP—Foreign judgment—Colonial firm—Agreement to submit to jurisdiction - - - - - - - **235**
See FOREIGN JUDGMENT.

PAUPERIS—In forma—Appeal—Opinion of counsel - - - - - - **181**
See PRACTICE. 1.

PAWNBROKER—*Licence — Certificate — "Successor"—Exemption from necessity of obtaining Certificate—Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 39.

By s. 39 of the Pawnbrokers Act, 1872, a pawnbroker's licence is only to be granted to an applicant upon the production of a certificate granted under the Act, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors to obtain such certificate" :—

Held, that the exemption in favour of a successor only enabled him to carry on without

PAWNBROKER—*continued.*

obtaining a certificate the actual business in which he had succeeded a pawnbroker licensed at the commencement of the Act of 1872, and did not enable him to open or carry on a new business merely upon the payment of the licence duty and without obtaining a certificate.

Reg. v. *Commissioners of Inland Revenue* (*Ohlson's Case*), [1891] 1 Q. B. 485, discussed. THE KING *v.* INLAND REVENUE COMMISSIONERS. *Ex parte* SILVESTER - **Div. Ct. 108**

PAYMENT INTO COURT—Recovery of less amount - - - - - - **71**
See PRACTICE. 3.

—— Without denial of liability—Action of libel—Death of plaintiff - - **274**
See PRACTICE. 6.

PLATE—*Assay — Hall Mark — Watch-cases—Foreign Watches—Customs Act*, 1842 (5 & 6 *Vict. c.* 47), *s.* 59.

Gold and silver watch-cases, forming parts of finished watches imported into the United Kingdom from abroad, are gold and silver plate within the meaning of the Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59.

So *held*, reversing the judgment of Channell J., [1905] 2 K. B. 586. GOLDSMITHS' COMPANY *v.* WYATT - - - - - - **C. A. 95**

PLEADING—Libel—Defence of fair comment—Practice—Particulars - - - **502**
See DEFAMATION. 1.

PLEDGE—"Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade - - - - - - **510**
See FACTOR.

POLICE — *Constable — Obstructing Police in Execution of Duty—Giving Warning of "Police Trap" — Motor Cars — Prevention of Crimes Amendment Act*, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.

Two constables, having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. The respondent gave a warning of this fact of approaching cars, which then slackened speed. There was no evidence that the respondent was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace :—

Held, that the respondent was not guilty of the offence of obstructing the constables when in the execution of their duty within the meaning of s. 2 of the Prevention of Crimes Amendment Act, 1885. BASTABLE *v.* LITTLE **Div. Ct. 59**

—— Poor rate—Distress—Charges—"Keeping possession" of goods seized - - **456**
See RATES 2.

POLICY—Insurance.
See under INSURANCE ; INSURANCE, LIFE ; and INSURANCE, MARINE.

POLLUTION—River—Summary proceedings by sanitary authority—Notice of intention to take proceedings—Validity - **431**
See RIVER.

POOR LAW—*Guardians—Negligence of Officer—Liability of Guardians to Pauper Inmate—Action for Damages—Common Employment.*

The employment of a pauper set to work by the guardians of the poor under the powers given to them by the Poor Law Acts and Orders is not contractual, but statutory, and therefore the defence of common employment is no answer to an action by a pauper so employed against the guardians to recover damages for injury suffered in such employment through the negligence of an officer of the guardians. But the setting the paupers to work is part of the administrative duties imposed on the guardians by statute, and an action by the pauper against the guardians for negligence of their officer in discharge of these duties will not lie.

Levingston v. *Lurgan Guardians*, (1868) I. R. 2 C. L. 202, distinguished.

Brennan v. *Limerick Guardians*, (1878) 2 L. R. Ir. 42, and *Dunbar* v. *Ardee Guardians*, [1897] 2 I. R. 76, followed.

Decision of a Divisional Court, [1906] 1 K. B. 538, reversed. TOZELAND *v.* WEST HAM UNION **C. A. 920**

2. —— *Removal—Adoption of Pauper Child by Guardians—Poor Law Act*, 1899 (62 & 63 *Vict. c.* 37), *s.* 1.

Where the guardians of a poor law union have passed a resolution under the Poor Law Act, 1899, that the rights and powers of the parent of a child maintained by them shall vest in them, they are not precluded by that resolution from subsequently removing the child to the union in which it has a settlement. WANTAGE UNION *v.* BRISTOL UNION - **Div. Ct. 68**

POOR RATES.
See under RATES.

PRACTICE—*Appeal—Application by Respondent for Leave to Appear in forma pauperis—Opinion of Counsel—Rules of Supreme Court, Order XVI., rr.* 23, 24.

A respondent to an appeal will be allowed to appear in forma pauperis to resist the appeal without producing an opinion of counsel. HANDFORD *v.* GEORGE CLARKE, LD. **C. A. 181**

2. —— *Appeal — Time for Appealing — Mistake as to Effect of Rule—Order in Matter not being an Action—Appeal brought too late—Special leave to Appeal—Discretion of Court - Rules of Supreme Court, Order LVIII., r.* 15.

Where, through a mistake of counsel as to the effect of Order LVIII., r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing :—

Held, upon the authority of *In re Helsby*, [1894] 1 Q. B. 742, and *International Financial Society* v. *City of Moscow Gas Co.*, (1877) 7 Ch. D. 241, that there was no sufficient ground for granting special leave to appeal under the before-mentioned rule. *In re* COLES AND RAVENSHEAR - - - - - **C. A. 1**

PRACTICE—*continued.*

3. —— *Costs — Payment into Court — Recovery of less Amount—Costs up to Payment into Court—Payment out of Amount recovered—Rules of Supreme Court, Order XXII., r.* 6 (*c*).

If a defendant in an action for unliquidated damages denies liability, but pays money into Court, and the plaintiff proceeds with the action, and recovers from the defendant an amount which carries costs, but is less than the sum paid into Court, the plaintiff is entitled to the whole costs of the action down to payment in, and the subsequent costs of issues on which he succeeds.

The making of an order under Order XXII., r. 6 (*c*), for payment out of money paid into Court by a defendant with a denial of liability, is discretionary, but the presumption is that the amount recovered by the plaintiff should be paid out to him, and it lies on the defendant to rebut that presumption. POWELL *v.* VICKERS, SONS & MAXIM, LD. - - - - - **C. A. 71**

4. —— *Costs—Trial with Jury—Separate Issues—Issue on which Defendant succeeds—No Order affecting Costs of Issue—Form of Judgment — "Event" — Rules of Supreme Court, Order LXV., r.* 1.

In an action tried with a jury where there are separate issues, and the plaintiff obtains a verdict and judgment, but the defendant is successful as to one of the issues, if the judge makes no order with regard to that issue interfering with the incidence of costs under Order LXV., r. 1, the defendant is entitled to have the judgment drawn up so as to give him the costs of the issue on which he succeeds. HOYES *v.* TATE - - - - - **C. A. 656**

5. —— *Joinder of Causes of Action—Action of Tort—Allegation of Joint Tort—Alternative Allegation of separate Torts — Costs — Costs against Plaintiff of successful Defendant—Addition to Costs recoverable from unsuccessful Defendant — Rules of Supreme Court, Order XVI., rr.* 4, 7.

The plaintiff was injured by a collision between two vehicles, and brought an action against the respective owners. The statement of claim alleged that the injury to the plaintiff was caused by the joint negligence of the two defendants, and it also alleged in the alternative negligence on the part of each defendant causing the injury. No application was made to strike out either of the defendants, and the case went to trial. The jury found negligence on the part of the defendant first named on the record, and negatived negligence on the part of the other defendant. The judge entered judgment for the plaintiff against the first-named defendant and judgment for the successful defendant, with costs in each case. The judge further ordered that the costs so payable by the plaintiff should be included in the costs recoverable from the first-named defendant. On appeal :—

Held, that after verdict and judgment it was too late to object to the jurisdiction to try the action on the ground that torts were alleged severally against the two defendants.

Held, also, that in an action of tort tried with a jury, in which relief is claimed against

PRACTICE—*continued.*
two or more defendants in the alternative, there is jurisdiction to direct that costs payable to a successful defendant should be included in the costs recoverable by the plaintiff from an unsuccessful defendant.

Per curiam: After the alteration of r. 1 of Order XVI., following on the decision in *Smurthwaite* v. *Hannay*, [1894] A. C. 494, the joinder, in an action of tort, of defendants against whom the right to any relief, in respect of or arising out of the same transaction, is claimed, whether jointly, severally, or in the alternative, is authorized by r. 4 of the order.

Sanderson v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, applied.

Sadler v. *Great Western Ry. Co.*, [1896] A. C. 450, distinguished. BULLOCK *v.* LONDON GENERAL OMNIBUS COMPANY - - **C. A. 264**

6. —— *Payment into Court without denial of Liability—Action of Libel—Death of Plaintiff—Abatement of Action—Jurisdiction as to disposal of Money in Court—Payment to Executor of Plaintiff.*

In an action of libel the defendant pleaded an apology and payment of money into court. The plaintiff did not take the money out of court; and he died before the action came on for trial. An order was made by a judge at chambers that the money should be paid out to the executor of the plaintiff. On appeal:—

Held, that the judge had power in his discretion to make the order.

Brown v. *Feeney*, [1906] 1 K. B. 563, applied. MAXWELL *v.* VISCOUNT WOLSELEY - **C. A. 274**

7. —— *Service out of Jurisdiction—Writ—Libel in Newspaper—Injunction—Judicial Discretion—Rules of Supreme Court, Ord. XI., r. 1 (f).*

In an action against a newspaper company registered in Scotland and carrying on business solely in that country, the plaintiffs claimed damages for alleged libels in a newspaper belonging to the defendants and also an injunction against the repetition of the alleged libels within the jurisdiction. The circulation of the newspaper was practically confined to Scotland, although a few copies were sold on the bookstalls at two railway stations just within the English border. The defendants disclaimed any intention of repeating the alleged libels in their newspaper, but intended to justify them at the trial:—

Held, that although by their claim of an injunction against a repetition of the alleged libels within the jurisdiction, and on the assumption that that claim was made bona fide, the plaintiffs had technically brought the case within the provisions of Ord. XI., r. 1 (*f*), the Court, in the exercise of its judicial discretion, ought to refuse leave to issue a writ for service out of the jurisdiction, there being, under the circumstances, no reasonable probability that the plaintiffs would obtain an injunction at the trial of the action. WATSON & SONS *v.* DAILY RECORD (GLASGOW), LD. - - **C. A. 853**

8. —— *Striking Out Defence — Abuse of Process of the Court.*

The defendants in an action to recover damages for negligence brought by a foreigner residing out of the jurisdiction, after obtaining an order that the plaintiff should give security for costs (with which he complied), delivered a defence in which they denied the negligence and paid a sum of money into Court with a denial of liability. With the defence was delivered a letter written by the defendants' solicitor, in which, after stating that the traverse of negligence was a technical plea merely to secure that the money paid into Court should remain there until the trial unless taken out by the plaintiff in satisfaction of his claim, he unreservedly undertook on behalf of the defendants not to contest liability at the trial:—

Held, that the defence was a sham defence, and must be struck out as being an abuse of the process of the Court.

Remington v. *Scoles*, [1897] 2 Ch. 1, considered and applied. CRITCHELL *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY **C. A. 860**

—— Pleading—Libel—Defence of fair comment—Particulars - - - - **502**
See DEFAMATION. 1.

"**PREMISES**"—East London Waterworks Act.
See LONDON. 3 - - - - **285**

PREMIUMS—Insurance.
See under INSURANCE, LIFE.

PREVENTION OF CRIMES—Obstructing police in execution of duty—Giving warning of "police trap"—Motor car - **59**
See POLICE.

PRINCIPAL AND AGENT—"Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade - - **510**
See FACTOR.

—— Mercantile agent—Possession obtained by larceny by a trick—Purchase on joint account - - - - - **519**
See SALE OF GOODS. 2.

PRIVATE STREETS.
See under STREETS.

PRIVILEGE—Libel—Privileged occasion—Publication to clerks of company exercising privilege - - - - - **371**
See DEFAMATION. 2.

PROHIBITION—Service out of the jurisdiction—Action founded on breach of contract—Defendant resident in Scotland **145**
See COUNTY COURT. 2.

PROMISSORY NOTE—*Negotiable Instrument—Signature in Blank—Authority to fill up Note to limited Amount—Excess of Authority—Advance by Payees on Faith of Note—Estoppel—"Holder in due course"—Negotiation—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 20.

Where a defendant in an action brought by the payees of a promissory note against him, as maker of the note, had signed his name on a blank stamped piece of paper, and had entrusted the paper to another person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and deliver it to the plaintiffs as security for an advance to be made by them, and that person had fraudulently filled

PROMISSORY NOTE—*continued.*
the paper up as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud :—

Held, that the defendant was estopped from denying the validity of the note as between himself and the plaintiffs, and therefore the action was maintainable against him for the full amount of the note.

Herdman v. *Wheeler*, [1902] 1 K. B. 361, discussed and distinguished. LLOYD'S BANK, LD. *v.* COOKE - - - - - - **C. A. 794**

"Promissory Note" — Stamp — Treasury note of foreign Government - - **246**
See REVENUE. 5.

PROOF—Bankruptcy.
See under BANKRUPTCY.

PUBLIC AUTHORITIES PROTECTION — Costs — Taxation — Action against public authority - - - - - - **393**
See COUNTY COURT. 1.

PUBLIC HEALTH — Compensation — Damage caused by exercise of statutory powers **14**
See COMPENSATION.

—— Highway—Subsidence caused by mining operations—Damages, Measure of **78**
See HIGHWAY.

—— Sewers.
See under SEWERS.

—— Rates.
See under RATES.

PUBLIC HEALTH (LONDON) ACT.
See under LONDON.

PUMPING OPERATIONS—Causing water to percolate out of stream — Cause of action - - - - - - **588**
See WATER.

QUIET ENJOYMENT—Covenant running with the land—Indemnity - - **612**
See LANDLORD AND TENANT. 1.

RAILWAY—*Difference between Railway Companies—Agreement confirmed by Special Act—Provision for Arbitration—Arbitrator designated by Name—Death of person designated—Railway Commissioners, Jurisdiction of — Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 8.

Where by the terms of an agreement confirmed by the special Act of a railway company it was provided that any question which might arise between that company and another railway company as to the construction or carrying into effect of the agreement should be referred to a person designated by name, or, him failing, to an engineer to be appointed by the Board of Trade on the application of either party, and differences subsequently arose between the two companies as to the construction and carrying out of the agreement, the person so designated as aforesaid having in the meantime died :—

Held, that the case fell within the proviso to s. 8 of the Regulation of Railways Act, 1873, and therefore the power to compel a reference of differences to the Railway Commissioners given by that section did not apply. ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RAILWAY COMPANY *v.* TAFF VALE RAILWAY COMPANY - - - - - - **C. A. 356**

2. —— *Light Railways Act*, 1896 — *Order incorporating Lands Clauses Acts—Arbitration —Costs—Taxation by Master of Supreme Court —Review of Taxation—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *ss.* 12, 13—*Lands Clauses (Taxation of Costs) Act*, 1895 (58 & 59 *Vict. c.* 11), *s.* 1.

Where an order under the Light Railways Act, 1896, incorporates the Lands Clauses Acts, and on a submission to arbitration under the Light Railways Act the arbitrator awards costs to be paid by one of the parties to the submission, either party can require, under the Lands Clauses (Taxation of Costs) Act, 1895, s. 1, that the costs shall be taxed and settled by one of the Masters of the Supreme Court, whose decision is not open to review. *In re* CANNINGS, LD., AND MIDDLESEX COUNTY COUNCIL - - **C. A. 51**

3. —— *Mines—Compensation— Coal required to be left unworked—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

The compensation payable by a railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, in respect of "such mines" as are required to be left unworked, is not profit, but indemnity for damages accrued to the owners (whether lessor or lessee the principle is the same) by reason of the embargo of the railway company which prevented the working of this particular part of the mine, and in calculating the value to the owner of his interest thus damaged, all the surrounding circumstances must be considered, including those that tend to diminish the injury that has accrued, damages being assessed on the basis that the owner is to get only what he would be entitled to under a fair bargain and nothing beyond.

Decision of Bigham J., [1906] 1 K. B. 195, reversed.

Smith v. *Great Western Ry. Co.*, (1877) 3 App. Cas. 165, distinguished. JAMES JOICEY & CO. AND EXECUTORS OF S. A. D. EDEN *v.* NORTH EASTERN RAILWAY COMPANY **C. A. 402**

—— Bridge—Approaches—Public carriage road carried over railway—Liability of railway company to widen - - **739**
See BRIDGE.

—— Poor rate—Rateable value—Link line—Interest on cost of construction - **717**
See RATES. 4.

RATES—*Burial Ground separated from Church —Churchyard—Liability to Poor Rate—Premises "exclusively appropriated to Religious Worship" — Poor Rate Exemption Act*, 1883 (3 & 4 *Will.* 4, *c.* 30).

The old churchyard of a parish church was closed under an order made under the Acts relating to overcrowded burial grounds, and two sites contiguous to each other, but at a distance of 300 yards from the church, were acquired by the Ecclesiastical Commissioners or their predecessors under the Church Building Acts.

RATES—*continued.*

The sites were consecrated for interment according to the rites of the Church of England and thereafter constituted the burial ground used in connection with the church. There was a fixed fee for the performance of burials and a scale of charges for the purchase of graves in the burial ground. These included charges for the purchase of freehold graves, the reopening of graves, for single interments in public graves, for placing memorials, for planting, painting, and other matters; and the net income derived therefrom was received by the rector of the parish and retained by him to his own use:—

Held, that the burial ground was to be treated, not as a cemetery which has its occupiers and is a rateable hereditament, but as a parish churchyard in respect of which the rector was not rateable, inasmuch as, although the parish churchyard is the freehold of the parson and he is entitled to such rights as cutting the grass growing in it and to customary fees for burials, he has never been held to be in occupation of it so as to make him liable to the poor rate as a beneficial occupier. This principle must extend to additional spaces of ground acquired by gift or purchase and annexed to original ancient churchyards which have become full. It also extends to similar spaces which, although acquired and added to the original churchyard, are not immediately contiguous to it. NORTH MANCHESTER OVERSEERS *v.* WINSTANLEY - - - - **Div. Ct. 27**

2. —— *Distress—Charges — "Keeping Possession" of Goods seized—"Man in Possession"—Poor Rate—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93, *s.* 1; *Sched.—Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *s.* 23.

A constable, who had levied a distress for poor rates for an amount not exceeding 20*l.*, removed the goods seized to a police station for safe custody; they were there locked up in a cupboard, the key of which was hung up in the police station; after remaining there for five days they were sold by public auction:—

Held that, under a table of fees authorized by s. 23 of the Police Act, 1890, and approved by a Secretary of State, the constable was entitled to make a charge of 1*s.* per day for "keeping possession" of the distress.

Per Lord Alverstone C.J.: The expression "man in possession," as used in the schedule to the Distress (Costs) Act, 1817, means a man in possession of the goods seized, and is not confined to a man in possession upon the premises where the seizure took place. SCOTT *v.* DENTON **Div. Ct. 456**

3. —— *Occupation—Warehouse—Intention to Occupy.*

A warehouse belonging to a warehouseman was used by him for the purpose of being let as a whole, or in separate floors or rooms, for the storage of goods, or of receiving goods for storage at a rent per ton or per package per week. The warehouse having been rated to certain rates made for a city, the warehouseman, during the currency of these rates, gave notice to the rating authority that he had gone out of occupation of the warehouse. At that time there were no goods in the warehouse, and it was closed; and the warehouseman had given notice to a company, which supplied water for the purposes of the hydraulic lift on the premises, to cut off the water supply, which they did, and had removed the weights, scales, and trucks used for weighing and trucking goods on the premises to an adjoining warehouse which belonged to him. The water supply could, however, at any moment be restored on notice to the company, and the weights, scales, and trucks brought back, whenever required; and the warehouseman was still prepared to receive applications for the hire of storage room in the warehouse, and ready and willing to reopen and receive goods into it, provided that enough goods were offered to fill half of the whole capacity of the warehouse, that being the smallest quantity for which he thought it worth while commercially to open the warehouse; and a bill was posted on the premises stating that they were to let:—

Held, that there was no cessation of occupation of the warehouse by the warehouseman, and he therefore was liable for the payment of the rates in respect of the period during which the above-mentioned state of things continued.

Overseers of Bootle v. *Liverpool Warehouse Co.*, (1901) 85 L. T. 45, distinguished. THE KING *v.* MELLADEW - - - **C. A. 192**

4. —— *Railway—Link Line — Interest on Cost of Construction—Evidence—Admissibility of Matters outside the Parish—Poor Rate—Rateable Value.*

A railway company under agreement with the G. W. R. Company constructed a short link line connecting the railway systems of the two companies for mutual interchange of traffic; there were no stations or sidings on this link line and it originated no traffic, and no other railway company could have been found to acquire it:—

Held (adopting the line of cases of which *South Eastern Ry. Co.* v. *Dorking*, (1854) 3 E. & B. 491, is an instance, in preference to the line of cases of which *Great Eastern Ry. Co.* v. *Haughley*, (1866) L. R. 1 Q. B. 666, and *Reg.* v. *Llantrissant*, (1869) L. R. 4 Q. B. 354, are examples), that the cost of the construction of the link line was an element to be taken into consideration in arriving at its true rateable value.

Decision of the Divisional Court, [1906] 1 K. B. 587, reversed. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION - **C. A. 717**

5. —— *Sewage Farm—Poor Rate — Assessment.*

A sewerage board, being under a statutory obligation to dispose of the sewage of a district, acquired for the purpose a farm, on which they laid pipes and constructed channels for the distribution of the sewage. This farm they let to a tenant as a sewage farm. The rent reserved by the lease was a fair rent for the farm as agricultural land, including the manurial value of the sewage:—

Held that, in assessing the value of the farm, the rating authority were bound to take into consideration the benefit accruing to the sewerage

RATES—*continued.*
board from the farm as a means of enabling them to discharge their statutory duties.
Decision of Divisional Court, [1906] 1 K. B. 214, reversed. DAVIES *v.* SEISDON UNION **C. A. 630**

6. —— *Tramroad—Tramway—Land "used only as a Railway constructed under any Act of Parliament"—Local Government Acts—General District Rate—Assessment—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).
Under the powers of local Acts of 1896 and 1898 a company constructed and maintained a tramroad connecting two systems of tramways; various provisions of the Railways Clauses Consolidation Act, 1845, were incorporated in the local Act of 1896 and applied to the tramroad, which for the purposes thereof was to "be deemed to be a railway"; certain provisions of the Tramways Act, 1870, were made applicable only to the tramways, and certain provisions of the Railway and Canal Traffic Acts, 1854, 1873, and 1888, were applied to the company "as if it were a railway company" and to the tramroad and tramway "as if they were railways." The tramroad, which was on raised rails, laid on sleepers, was constructed on land the exclusive property of the company, fenced off from adjoining land except at the level crossings of roads; the tramroad and tramways were worked as one undertaking by electricity on the overhead system :—
Held (Buckley L.J. doubting), reversing the decision of the Divisional Court, that the tramroad was land "used only as a railway constructed under the power of an Act of Parliament for public conveyance" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the company were consequently entitled to be assessed in respect of the said railway at one-fourth of its net annual value.
Origin of words "tramroad" and "tramway" discussed. BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY *v.* THORNTON URBAN DISTRICT COUNCIL - - - - - - **C. A. 568**

"RECEIPT"—Stamp duty—Counsel's brief—Statement of fees - - - - **462**
See REVENUE. 6.

REGISTRATION—Franchise.
See under PARLIAMENT.

REMOTENESS — Contract — Consideration — Breach of duty to take care—Damages
See CONTRACT. **483**

REMOVAL — Refuse — Hotel — Trade refuse—Public Health (London) Act - **910**
See LONDON. 2.

REMUNERATION.
See under COSTS.

RENT—Lease under seal—Antecedent agreement to take bill for rent—Evidence, inadmissibility of - - - - **10**
See LANDLORD AND TENANT. 2.

—— Licensing Acts—Compensation charge—"Rent payable"—Income tax - **47**
See LICENSING ACTS. 1.

REPAIRS—Carriage road — Recovery of expenses — Jurisdiction of metropolitan police magistrate - - - - **881**
See LONDON. 1.

—— Mortgage of ship—Repairs by mortgagor—Salvage loss—Underwriters - - **116**
See SHIPPING. 10.

REPRESENTATION OF THE PEOPLE.
See under PARLIAMENT.

REPUTED OWNERSHIP — Proof — Goods in order and disposition of bankrupt **397**
See BANKRUPTCY. 5.

REVENUE—*Estate Duty—Property passing on Death—Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 3—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 14; *s.* 15, *sub-s.* 1.
An "interest is created" within the meaning of the words "and no other interest is created by the said disposition" in the Finance Act, 1896, s. 15, sub-s. 1, by a limitation in a marriage settlement in favour of unborn children of the marriage, although there never is a child of the marriage.
By a marriage settlement property, described as the husband's fortune and the wife's fortune respectively, was settled by the husband and wife upon trust (inter alia) to pay during the joint lives of husband and wife an annuity of 400*l.* to the wife for her separate use without power of anticipation and to pay the residue of the income, and after the death of the wife the whole income, to the husband for life, and after his death to pay the whole income to the wife for life, and upon trust after the death of the survivor for such children of the marriage as the husband and wife, or the survivor, should appoint, and, in default of appointment, upon trust for the children of the marriage who should attain the age of twenty-one, or being daughters should marry under that age, and, failing such issue, upon trust as to the husband's fortune for him, his executors, administrators and assigns, and as to the wife's fortune for her executors, administrators and assigns. There was no issue of the marriage, and the wife survived the husband :—
Held (affirming the judgment of Walton J.), that upon the death of the husband estate duty became payable upon the wife's fortune, except as to so much of it as formed part of the corpus which produced the annuity of 400*l.*; but that as to this latter amount no estate duty was payable by reason of the provisions of the Finance Act, 1894, s. 5, sub-s. 3.
Attorney-General v. *Wood*, [1897] 2 Q. B. 102, followed. ATTORNEY-GENERAL *v.* GLOSSOP **C. A. 163**

2. —— *Estate Duty—Reversionary Interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 6.
Where under s. 7, sub-s. 6, of the Finance Act, 1894, the person accountable for the estate duty on an interest in expectancy has exercised the option given by that sub-section, and deferred the payment of the duty in respect of that interest until that interest has fallen into possession, the amount on which the duty is payable is the value of the interest when it has

REVENUE—*continued.*
fallen into possession, and not merely its value on the death of the deceased. *In re* EYRE
Bray J. 331

3. —— *Income Tax—Public Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sched. E, r.* 1.

Easter offerings given to the incumbent of a benefice as a personal gift to himself are not perquisites or profits accruing by reason of his office within the meaning of r. 1 of the Income Tax Act, 1842, s. 146, Sched. E, and he is therefore not liable to pay income tax under Sched. E upon them. COOPER *v.* BLAKISTON
Bray J. 336

4. —— *Income Tax—Sewer—Vested in Local Authority* — "*Hereditament*" — "*Capable of actual Occupation*"—*Income Tax Act*, 1842 (5 & 6 *Vict.* c. 35), *s.* 60, *Sched. A, Rules No. I., No. III.*

A sewer vested in and under the control of a local authority, and of such a character that it is rateable to poor rate, is, for the purpose of income tax, chargeable in respect of the annual value thereof according to s. 60, Sched. A, Rule No. I., of the Income Tax Act, 1842, as a hereditament capable of actual occupation.

Judgment of Walton J., [1906] 1 K. B. 294, affirmed. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* BENSTED (SURVEYOR OF TAXES) - - - - **C. A. 490**

5. —— *Stamp—Treasury Note of Foreign Government*—"*Promissory Note*"—"*Marketable Security*"—"*Debenture*"—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 33, 82, 122.

A foreign Government issued a series of instruments, described as "gold coupon treasury notes," each of which contained a promise to pay the amount of the note in gold to the bearer at a certain date two years from the date of issue; attached to each note were coupons for the payment of the interest in gold, the interest being payable abroad, or at the option of the bearer in London. The notes were redeemable at par at any time before maturity at the option of the issuing Government upon their giving sixty days' notice of their intention to redeem; they gave no security to the holder beyond the promise to pay the face amount of the note; and they were marketable, though not readily saleable, on the London Stock Exchange:—

Held, that the instruments were promissory notes within the meaning of s. 33 of the Stamp Act, 1891, but that they were also marketable securities within the meaning of s. 122, sub-s. 1, of the Act, and chargeable with stamp duty at the rate applicable to such securities.

Decision of Walton J., [1906] 1 K. B. 318, reversed. SPEYER BROTHERS *v.* INLAND REVENUE COMMISSIONERS - - **C. A. 246**

6. —— *Stamp Duty*—"*Receipt*"—*Counsel's Brief—Statement of Fees—Counsel's Name or Initials placed against Fee—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 101; *Sched. I.*

When counsel, after payment of a fee of 2*l.* or upwards, places his initials or name against

REVENUE—*continued.*
the fee on his brief or at the foot of a statement of fees, the document is liable to the stamp duty of 1*d.* as a receipt within the meaning of s. 101 and the heading "Receipt" in the First Schedule to the Stamp Act, 1891. GENERAL COUNCIL OF THE BAR (ENGLAND) *v.* INLAND REVENUE COMMISSIONERS - - - **Bray J. 462**

—— Income tax—Licensing Acts—Compensation charge—"Rent payable" - - **47**
See LICENSING ACTS. 1.

REVERSIONARY INTEREST—Estate duty **331**
See REVENUE. 2.

RIVER—*Pollution—Summary Proceedings by Sanitary Authority—Consent of Local Government Board—Notice of Intention to take Proceedings—Validity of Notice—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 6, 13.

The Rivers Pollution Prevention Act, 1876, authorizes a sanitary authority to take proceedings in respect of certain offences under the Act, but provides that such proceedings shall not be taken without the consent of the Local Government Board, nor until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender:—

Held, that the notice could not be given until the consent of the Local Government Board had been obtained.

West Riding of Yorkshire Rivers Board v. *Scarr End Mill Co.*, (1901) 65 J. P. 776, overruled.

Midlothian County Council v. *Oakbank Oil Co., Ld.*, (1903) 5 F. 700, followed. WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* ROBINSON BROTHERS - - - **C. A. 431**

RULES OF SUPREME COURT—**Order XI.** (*Service out of Jurisdiction*), **r. 1** (*f*) **853**
See PRACTICE. 7.

—— **Order XVI.** (*Parties*), **rr. 4, 7** - - **264**
See PRACTICE. 5.

—— **rr. 23, 24** - - - - - - **181**
See PRACTICE. 1.

—— **Order XXII.** (*Payment into and out of Court and tender*), **r. 6** (*c*) - - **71**
See PRACTICE. 3.

—— **Order LVIII.** (*Appeals to the Court of Appeal*), **r. 15** - - - - **1**
See PRACTICE. 2.

—— **Order LXV.** (*Costs*), **r. 1** - - - **656**
See PRACTICE. 4.

RUM—Diluted with water—"Prejudice of the purchaser" - - - - - **278**
See ADULTERATION.

SALE—Food and drugs.
See under ADULTERATION.

—— Street—Apportioned expenses—Charge on premises—Sale - - - - **445**
See STREETS.

SALE OF GOODS—*Contract for Sale of Cattle at Price including Cost, Freight, and Insurance*—

SALE OF GOODS—*continued.*

Contract by Seller to insure Cattle "against all Risks"—Warranty in Policy against "Capture, Seizure, and Detention"—Slaughter of Cattle in consequence of Government Prohibition against Landing—Liability of Seller.

Cattle were bought at Buenos Ayres, at a price including cost, freight, and insurance, for shipment to Durban; by the contract of sale the seller was to insure the cattle "against all risks." The seller obtained, and handed to the buyer, a policy of insurance which was an ordinary "all risks" Lloyd's policy, but which, in accordance with the usual practice among insurance brokers and underwriters with regard to such policies, contained a warranty against "capture, seizure, and detention, and the consequences thereof." Disease broke out among the cattle on the voyage, and on arrival at Durban the authorities forbade their landing, and the cattle were consequently slaughtered. The underwriters having refused to pay upon the policy, except in regard to risks not affected by the warranty, the buyer brought an action against the seller to recover damages for breach of contract to insure the cattle "against all risks":—

Held, that the contract, being a contract between buyer and seller, contemplated an insurance of the cattle against all risks whatsoever, and was not satisfied by the procuring of a policy which, as between insurance brokers and underwriters, would be considered an "all risks" policy, and that the seller was therefore liable to the buyer for the damage arising in consequence of the cattle not being allowed to land. YUILL & Co. *v.* SCOTT ROBSON - - **Channell J. 685**

2. —— *Possession obtained by Larceny by a Trick—Mercantile Agent—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1—*Purchase on Joint Account.*

A mercantile agent obtained possession of the plaintiff's goods under circumstances which amounted to larceny by a trick, and handed the goods to B. to sell for him. B., who had grounds for suspecting the mode in which the mercantile agent had obtained possession of the goods, sold them to a firm, who purchased them in good faith and agreed with B. that their purchase should be on the joint account of B. and themselves. They accordingly debited B. in their books with half the purchase price, and, having resold the goods at a profit, credited him with half the profit. In an action for conversion of the goods against the firm and B.:—

Held that, the mercantile agent being in possession of the goods as a mercantile agent with the consent of the owner, it was immaterial, as regarded the title of the firm to the goods, that the mercantile agent had when he obtained the goods intended to steal them; that s. 2 of the Factors Act, 1899, applied, and gave the firm a good title to the goods; that that title was not affected by their having purchased on joint account with B., who had acted in bad faith, but that B. was liable to the plaintiff for the conversion of the goods. See also *Oppenheimer* v. *Attenborough & Son*, Channell J., [1907] 1 K. B. 510. OPPENHEIMER *v.* FRAZER & WYATT **Channell J. 519**

SALE OF GOODS—*continued.*

—— "Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade *See* FACTOR. **510**

SALVAGE—Shipping.
See under SHIPPING.

SCOTTISH LAW—County court—Prohibition—Alternative remedy—Service out of the jurisdiction - - - - - **145**
See COUNTY COURT. 2.

SEAMAN—Contract of service—Contraband of war — Refusal to proceed — Offence against discipline - - - - **834**
See SHIPPING. 11.

—— Contract of service for ordinary voyage—Carriage of contraband—Refusal to proceed to belligerent port—Right to wages - - - - - - - **670**
See SHIPPING. 12.

SERVANT—Master and
See under EMPLOYER AND WORKMAN.

SERVICE—Out of the jurisdiction—Prohibition—Defendant resident in Scotland **145**
See COUNTY COURT. 2.

—— Out of the jurisdiction—Writ—Libel in newspaper—Injunction—Judicial discretion - - - - - - **853**
See PRACTICE. 7.

SETTLEMENT—Estate duty.
See under REVENUE.

SEWAGE FARM—Poor rate—Assessment- **630**
See RATES. 5.

SEWER—Income tax—Vested in local authority—"Capable of actual occupation" **490**
See REVENUE. 4.

SEWERS — "*Single Private Drain*" — *Pipe receiving Drainage from Sewer—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

Sect. 19, sub-s. 1, of the Public Health Acts Amendment Act, 1890, applies to cases where two or more houses belonging to different owners are connected with a public sewer by a single private drain.

A number of houses in a row, six of which belonged to the respondent, and the rest to other owners, were drained in pairs in the following manner:—Each house of each pair was drained by a separate pipe into a pipe common to both houses, and each of these common pipes discharged into a line of pipes running along in private ground at the rear of the houses, which was connected with the public sewer in a street at right angles to the row of houses. The common pipes, which received the drainage from the respondent's houses, were admitted by the appellants to be "sewers" within the meaning of the Public Health Act, 1875, and not to come within the operation of s. 19 of the Public Health Acts Amendment Act, 1890:—

Held that, even if the said line of pipes were a "single private drain" within the meaning of s. 19, yet, inasmuch as the common pipes, by

SEWERS—*continued.*

which the separate drains of the respondent's houses were connected with it, were sewers, the case did not come within the section, the houses not being connected with the public sewer by a single private drain; and that the respondent, therefore, was not liable to contribute to the expense of work done to the said line of pipes under s. 41 of the Public Health Act, 1875. WOOD GREEN URBAN DISTRICT COUNCIL *v.* JOSEPH - - - - - - **C. A. 182**

SHIPPING—*Charterparty—Bill of Lading—Duty of Charterer to present proper Bill of Lading—Variance between Charterparty and Bill of Lading—Liability of Shipowner to Holder of Bill of Lading—Action by Shipowner against Charterer for Recovery of Loss—Indemnity—Breach of Contract.*

The defendants chartered the plaintiffs' ship to load a cargo of rice at Rangoon for delivery at Rio de Janeiro. The charterparty contained a negligence clause, and provided that the master should sign clean bills of lading at any rate of freight without prejudice to the charterparty. The defendants at Rangoon presented to the master for signature bills of lading containing no negligence clause, and the master signed the bills of lading in this form, both parties believing, wrongly, that the charterparty negligence clause was incorporated into the bills of lading. On the voyage to Rio de Janeiro the ship was stranded through the negligence of the master, causing a loss of cargo, in respect of which the holders of the bill of lading recovered judgment against the plaintiffs, who by this action claimed an indemnity from the defendants:—

Held, that the defendants, in presenting and obtaining the signature of bills of lading which, in the hands of third parties, imposed on the plaintiffs a greater liability than was imposed by the charterparty, had committed a breach of contract which caused damage to the plaintiffs, in respect of which they were entitled to recover.

Per Buckley L.J.: The plaintiffs were also entitled to recover on the ground of a right to indemnity.

Decision of Phillimore J., [1906] 2 K. B. 792, affirmed. MOEL TRYVAN SHIP COMPANY *v.* KRUGER & Co. - - - - **C. A. 809**

2. —— *Charterparty—Bill of Lading incorporating Charterparty—Demurrage—Discharge at average rate per day—Delay in discharging—Strike preventing or delaying Discharge.*

The defendant was the charterer of the plaintiffs' ship, and the consignee of a cargo of coal shipped under bills of lading incorporating the charterparty, which provided that the charterer should discharge the ship, and that the consignee should take the cargo from alongside at an average rate of 500 tons per day and should pay demurrage if the ship was longer detained, but that in case of strikes preventing or delaying the discharge the time lost was not to count unless the ship was already on demurrage.

If the discharge had proceeded at the stipulated rate it would have been completed on

SHIPPING—*continued.*

January 3, 1905. On December 31, 1904, when less than half the cargo had been got out, a strike occurred among the stevedores at the port of discharge, and the discharge was not completed until January 15, 1905:—

Held that, except as to that portion of the cargo which, if the discharge had proceeded at the stipulated rate, would have remained undischarged on December 31, the defendant could not rely on the strike as an excuse for delay, since if he had not been dilatory the rest of the cargo would have been discharged before the strike began.

Semble that, except as to the portion aforesaid, the strike did not prevent or delay the discharge within the meaning of the charterparty. ELSWICK STEAMSHIP COMPANY, LD. *v.* MONTALDI **Bigham J. 626**

3. —— *Charterparty—Charter of Ship for Voyage—Implied Condition that Shipowner will not use Ship in manner prejudicial to Charterer—Carriage of Bunker Coal intended for use on future Voyage.*

The plaintiffs chartered the defendants' ship to load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions and furniture," and proceed therewith to two or three ports of discharge. On arrival of the ship at her first port of discharge the defendants took on board a large quantity of bunker coal intended for use, not upon the existing voyage, but upon some prospective voyage to be commenced after her final discharge. In consequence of the loading of the coal, the ship, on arriving at her next port of discharge, had to be lightened before she could get over the bar, whereby the plaintiffs were put to considerable expense. But for the loading of the coal she would have been able to enter the port without lightening:—

Held (affirming the decision of Kennedy J., [1906] 1 K. B. 572), that under such a charterparty the shipowner is not entitled to load, to the disadvantage of the charterer, more bunker coal than is reasonably necessary for the seaworthiness of the ship upon the chartered voyage and for the due performance of that voyage; that there is an implied term in the contract that the ship shall, except as aforesaid, be used only for the purposes of the charterers; and that the defendants had consequently committed a breach of their contract and were bound to recoup the plaintiffs the expense to which they had been put. DARLING *v.* RAEBURN - - **C. A. 846**

4. —— *Charterparty—Demurrage—Lay Days—Arrival at Place of Loading.*

There is in general as between shipowner and charterer (subject to a few possible exceptions) an obligation on the ship to go to the berth selected by the charterer. The obligation arises not necessarily from the terms of the charterparty, but rather from the relative positions of the shipowner and charterer, and the purpose and object of the contract, viz., to take the charterer's goods. The terms of the charterparty must, however, be looked at to see whether the obligation to go to the berth selected by the

charterer is to be performed in the shipowner's time before the ship can be treated as an arrival ship, or in the charterer's time after the lay days have commenced.

By a charterparty it was agreed that the plaintiffs' steamship should "proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . . viz., (4) at one or two safe loading ports or places in the river Paraná, not higher than San Lorenzo, ... which cargo the said charterers bind themselves to ship . . . . time for loading shall commence to count twelve hours after written notice has been given by the master . . . . that the vessel is in readiness to receive cargo . . . . and all time on demurrage over and above said laying days shall be paid for by the charterers."

The vessel was ordered to Bahia Blanca. She arrived off the pier at Bahia Blanca, and anchored in the river within the port a few ship's lengths off the pier. The place where the vessel anchored was not the usual loading place, but was merely a possible loading place. The master then gave notice that the ship was ready to load. The charterers desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port:—

Held, that the lay days did not begin twelve hours after the notice of readiness to load given by the master, but only after the vessel obtained the berth alongside the pier, inasmuch as there was no definite provision contained in the charter-party upon the point, and the rule laid down by Brett L.J. in *Nelson* v. *Dahl*, (1879) 12 Ch. D. 568, followed in *Pyman* v. *Drefus*, (1889) 24 Q. B. D. 152, applied.

Sanders v. *Jenkins*, [1897] 1 Q. B. 93; 2 Com. Cas. 12, discussed and explained. LEONIS STEAMSHIP COMPANY *v.* RANK, LD.

Channell J. 344

5. —— *Charterparty — Demurrage — Lay Days—Sundays and Holidays excepted—Work done on Sundays and Holidays—Shifting from Port to Port.*

A charterparty provided that thirteen running days, Sundays and holidays excepted, should be allowed the charterers for loading the cargo. Demurrage for any days over and above the said laying days was to be paid at the rate of 35*l.* per day.

By the direction of the charterers work was done in loading the ship on a Sunday after the lay days had begun to run and before they had expired:—

Held, that the proper inference to be drawn was that the parties had agreed to include that day among the lay days, and that, notwithstanding the express terms of the charterparty, that day was to be counted as a lay day.

In the absence of any indication to the contrary, the same inference is to be drawn when work is in fact done in loading the ship on a Sunday or holiday, whether by the direction or at the request of the charterers or not.

The charterparty also provided that the

ship should proceed to a named port and there load a cargo. The charterers were to have the option of using one or two neighbouring ports in the district of the named port, time in shifting ports to count as lay days:—

Held, that a Sunday or holiday occupied at the request of the charterers in shifting from one port to another in the district of the named port was to be included in the lay days. WHITTALL & CO. *v.* RAHTKEN'S SHIPPING COMPANY, LD. - - - - - - **Bray J. 783**

6. —— *Charterparty—Demurrage—Sundays and Holidays excepted.*

The plaintiffs were the owners, and the defendants the charterers of the steamship *Highfield*. The action was brought to recover 216*l.* 16*s.* 8*d.* for five days' demurrage.

By the contract of charter, which was dated December 3, 1905, the *Highfield* was to load not exceeding 2300 tons of wheat $\frac{\text{and}}{\text{or}}$ maize at Rosario, or at a port below, completing at Buenos Ayres or La Plata with cargo and live stock. The contract contained the following provision: "The steamer is to be loaded at the rate of 175 tons per weather working day, Sundays and holidays excepted."

The ship went to Rosario, and there took in part of her cargo. She then proceeded to La Plata, where she completed her cargo, including cattle and live stock. On Thursday, March 19, 1907, she arrived at La Plata at 4 P.M., having then taken eight days. On Saturday, 21, she had taken ten days.

The material question was whether Sunday, March 22, and Wednesday, March, 25, which was a holiday at La Plata, on each of which days the work of loading was actually carried on, were to be counted as working days.

Held, that the plaintiffs were entitled to judgment for one day's demurrage. BRANCKELOW STEAMSHIP COMPANY *v.* LAMPORT & HOLT.

Lord Russell of Killowen C.J. (February 17, 1897) - - - [1907] 1 K. B. 787, n.

7. —— *Charterparty—Demurrage—Sundays and Holidays excepted.*

The plaintiffs were charterers under an agreement between themselves and the defendants, who were the owners of several steamships, including the *Highland Heather*. The action was brought to recover (inter alia) a sum of 180*l.* 10*s.*, paid under protest by the plaintiffs to the defendants, including a sum of 10*l.* 16*s.* 8*d.* for six and a half hours' demurrage of the *Highland Heather*.

The agreement, dated June 18, 1904, between the plaintiffs and the defendants recited that the defendants had services of cargo and live stock steamers which they were running or proprosed to run as a two-weekly line from the River Plate to the port of Liverpool, and as a monthly line from the River Plate to the port of London, and that the plaintiffs had agreed to ship their output for the United Kingdom of frozen meat and offal by the said lines, and that the plaintiffs had agreed to carry the same on the conditions therein contained.

Judgment for the defendants. JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD.

Channell J. (January, 15, 1907)

[1907] 1 K. B. 788, n.

8. —— *Contract of Affreightment—Bill of Lading—Exception Clause—Deviation.*

Goods were shipped for carriage under a bill of lading, which contained an exception clause exempting the shipowners from liability for loss arising from (inter alia) negligence of stevedores employed by them in discharging the ship. The ship deviated from the voyage as described in the bill of lading. In the process of discharging the ship at the port of destination the goods were damaged through the negligence of the stevedores employed by the shipowners. In an action brought by the owners of the goods to recover the amount of the loss so occasioned to them :—

Held (affirming the judgment of Channell J., [1907] 1 K. B. 243), that the defendants having, by reason of the deviation, failed to perform the bill of lading contract, were not entitled to set up by way of defence the exception clause therein contained, and therefore the action was maintainable.

Balian v. *Joly, Victoria & Co.*, (1890) 6 Times L. R. 345, followed. JOSEPH THORLEY, LD. *v.* ORCHIS STEAMSHIP COMPANY, LD.

C. A. 660

9. —— *Contract of Carriage—Liability of Shipowner — Exceptions — Unseaworthiness— "Damage capable of being covered, or which has been paid for, by Insurance."*

The plaintiffs shipped frozen meat on board the defendants' steamer for carriage from the River Plate to the United Kingdom upon the terms of an agreement which contained numerous exceptions exempting the defendants from liability for (inter alia) unseaworthiness or unfitness of the ship, "provided all reasonable means have been taken to provide against unseaworthiness" ; "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance." Owing to a defect in the refrigerating apparatus, the ship was not fit to carry the cargo, which was consequently seriously damaged. Through the neglect of the defendants reasonable means had not been taken to prevent the unfitness. The plaintiffs were partially covered by insurance, and had been paid the insured proportion of the loss :—

Held (affirming the judgment of Bray J., reported [1906] 2 K. B. 804), that, the defendants having failed to take reasonable means to provide against the unfitness of the ship, the fact that the damage had been in part paid for by insurance did not exempt the defendants from liability for damages arising from the neglect of their implied obligation to supply a seaworthy ship.

Price v. *Union Lighterage Co.*, [1903] 1 K. B. 750; [1904] 1 K. B. 412, followed. JAMES NELSON & SONS, LD. *v.* NELSON LINE (LIVERPOOL), LD. (No. 2) - - - - - C. A. 769

10. —— *Mortgage of Ship together with Policies of Insurance thereon—Particular average Loss — Repairs by Mortgagor — Right of Mortgagee to Policy Money without paying for Repairs—Marine Insurance — Salvage Loss — Right of Underwriters to pay without Authority of Assured—Assignment of Claim under Policy — Validity of.*

The owner of a ship mortgaged her "together with the policies of insurance effected thereon" to secure advances. The ship, while insured, suffered a particular average loss within the policy, and the owner had her repaired. The owner being in default under the mortgage, the mortgage debt by the terms of the deed became immediately payable :—

Held, that the policy of insurance was to be treated as a substantive and independent security for the mortgage debt, and that the mortgagee was entitled to recover from the underwriters for his own use the amount of the particular average loss without being under any obligation to apply the money in payment of the cost of the repairs.

Where a ship is insured under a time policy and a particular average loss occurs, an assignment of the assured's claim against the underwriters in respect of that loss may be valid, notwithstanding that it is not expressed to assign the policy itself, if at the date of the assignment the policy has expired so that nothing remains to be done under it but to pay the claim.

A ship having, while insured, incurred salvage expenses as the result of a peril insured against, H., at the request of the owner, paid the salvors. The owner afterwards assigned to a creditor all moneys payable to him under the policy of insurance on the ship, and gave notice of the assignment to the underwriters. Subsequently H. applied to and received from the underwriters the amount payable under the policy in respect of the salvage loss. There was no clause in the policy authorizing the underwriters themselves to apply the policy money in satisfaction of the salvage claim, nor had the owner otherwise authorized them so to do :—

Held—(1.) that in the absence of such authority the payment by the underwriters to H. was not a discharge of their obligation under the policy ; and (2.) that, as before that payment the rights of the assignee had intervened, they had paid the wrong persons, and that they must consequently pay the money over again. SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY *v.* MARITIME INSURANCE COMPANY AND CROSHAW - - - Channell J. 116

11. —— *Seaman—Contract of Service—Contraband of War—Refusal to Proceed—Offence against Discipline—Order of Naval Court—Discharge of Seaman—Action for Wages—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 225, *sub-s.* 1 (*c*) ; *s.* 483.

A naval Court summoned under the provisions of the Merchant Shipping Act, 1894, in dealing with the offence of continued wilful disobedience by a seaman to lawful commands, may put in exercise all its statutory powers so far as

SHIPPING—*continued.*

they are applicable to the case, including the power to discharge the seaman from his ship, and is not limited to the powers of punishment conferred by the Act on a Court of summary jurisdiction in respect of the same offence.

An order regularly made by a duly constituted naval Court within the scope of its jurisdiction is conclusive in any subsequent legal proceedings of the rights of all the parties interested, whether they are parties to the proceedings before the naval Court or not; consequently, where by such order a seaman is discharged from his ship, the order is a bar to a civil action by the seaman against the owner for wrongful dismissal, notwithstanding that the owner was not a party to the criminal proceedings.

The plaintiff, who was engaged on a ship for a term of three years, which covered the period of the Russo-Japanese war, on the arrival of the ship at Yokohama refused to continue the voyage on the ground that the ship was carrying contraband of war. At the instance of the master a naval Court was convened, which found the plaintiff, with others of the crew, guilty of continued wilful disobedience to lawful commands and of insubordination prejudicial to the owner's interests, and rejected the men's plea with respect to the carriage of contraband; and the Court discharged the men from the ship and forfeited their wages. In an action by the plaintiff against the owner for wrongful dismissal and for wages, it appeared that the ship was carrying contraband at the time of the plaintiff's refusal to proceed :—

Held (affirming the decision of the Lord Chief Justice), that the order of the naval Court was a bar to the action. HUTTON *v.* RAS STEAM SHIPPING COMPANY, LD. - - **C. A. 834**

12. —— *Seaman — Contract of Service for Ordinary Voyage—Carriage of Contraband—Refusal to proceed to Belligerent Port—Right to Wages.*

The plaintiffs, who were British seamen, signed an agreement to serve on a British ship on a voyage not exceeding three years' duration to any ports within 75 degrees N. and 60 degrees S. latitude, commencing at Cardiff and proceeding thence to Hong Kong, and to end at a port in Europe. At the time of signing the plaintiffs knew that war had broken out between Russia and Japan, that the ship was to carry a cargo of coal to Hong Kong, and that coal was treated by both belligerents as contraband of war. After arrival at Hong Kong the plaintiffs were told by the master that the ship was going on to Sasebo, a port and naval base in Japan, but within the geographical limits of the voyage. The plaintiffs refused to go on to Sasebo with coal on board, and were thereupon charged before a Court of competent jurisdiction at Hong Kong with having impeded the progress of the ship by refusing to go to sea, and were convicted and imprisoned. Other sailors were substituted for the plaintiffs, and the ship went on to Sasebo. The plaintiffs, after their discharge from prison, were returned to this country as distressed seamen. The plaintiffs having brought

SHIPPING—*continued.*

an action to recover wages from the date of their trial at Hong Kong, and also general damages :—

Held, that the voyage from Hong Kong to Sasebo ceased to be an ordinary commercial voyage such as alone was contemplated by the agreement, and the plaintiffs were therefore justified in refusing to proceed; that the plaintiffs were entitled to wages, not merely up to the date of their arrival in this country, but up to the final settlement of their claims by the decision of the Court of Appeal, but that under the circumstances they were not entitled also to general damages for breach of the agreement.

Held, further, that the conviction of the plaintiffs at Hong Kong did not operate as an estoppel against their claims for wages. CAINE *v.* PALACE STEAM SHIPPING COMPANY **C. A. 670**

13. —— *Tonnage—Light Dues—Deck Cargo—Coal carried on Deck for use on Foreign Voyage—"Timber, Stores, or other Goods"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 85)—*Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 5; *Sched. II.*

Sect. 85, sub-s. 1, of the Merchant Shipping Act, 1894, provides that if any ship, other than a home trade ship, carries as deck cargo, that is to say, in any uncovered space upon deck, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable.

Coals carried in an uncovered space upon the deck of a ship upon a foreign voyage, though intended for the use of the ship upon the voyage, are stores or other goods, and are therefore carried as deck cargo, within the meaning of that enactment.

Consequently, by s. 5 and Sched. II. of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, light dues are payable in respect of the tonnage of the space occupied by such coals so carried at which those dues become payable.

Dicta in *Richmond Hill Steamship Co.* v. *Corporation of Trinity House*, [1896] 2 Q. B. 134, not followed. CAIRN LINE OF STEAMSHIPS, LD. *v.* TRINITY HOUSE CORPORATION **Bray J. 604**

—— Charterparty — Freight — Loss — Saving of charterparty hire—Commissioners **259**
See INSURANCE (MARINE).

—— Compensation—Injury—Defective plant—Stevedore—Unloading ship - **649**
See EMPLOYER AND WORKMAN. 3.

—— Dock—Advertisement of depth of water on dock sill—Warranty of accessibility
See HARBOUR **310**

SOLICITOR—Draft bills of costs agreed—Bankruptcy of client—Proof by solicitor—Trustee's title - - - - **155**
See BANKRUPTCY. 6.

SPECIAL CASE—Appeal by—Removal of refuse—Hotel—Trade refuse—Public Health (London) Act - - - - - 910
See LONDON. 2.

STAMP—"Receipt"—Counsel's brief—Statement of fees - - - - - 462
See REVENUE. 6.

—— Treasury note of foreign Government—"Promissory note" - - - 246
See REVENUE. 5.

STATUTE—Construction of statutes—Waterworks clauses - - - - - 205
See WATERWORKS.

STATUTES:—

1710.

9 Anne, c. 14, s. 1—*Gaming* - - - 746
See GAMING. 1.

1802.

42 Geo. 3, c. 119—*Gaming* - - 64, 448
See GAMING. 2, 3.

1817.

57 Geo. 3, c. 93, ss. 1, 2—*Distress—Costs* 690
See DISTRESS.

—— —— s. 1; Sched. - - - - - 456
See RATES. 2.

1827.

7 & 8 Geo. 4., c. 17—*Distress—Costs* - 456
See RATES. 2.

1833.

3 & 4 Will, 4, c. 30—*Poor Rate Exemption* 27
See RATES. 1.

1835.

5 & 6 Will. 4, c. 41, s. 1—*Gaming* - - 746
See GAMING. 1.

1842.

5 & 6 Vict. c. 35, s. 60; Sched. A., Rules No. 1, No. 3—*Income Tax* - - 490
See REVENUE. 4.

—— —— s. 60; Sched. A., No. IV., Ninth Rule - - - - - - - 47
See LICENSING ACTS. 1.

—— —— s. 146; Sched. E., r. 1 - - 336
See REVENUE. 3.

5 & 6 Vict. c. 47, s. 59—*Customs* - - 95
See PLATE.

1843.

6 & 7 Vict. c. 73, ss. 37, 41—*Solicitors* - 155
See BANKRUPTCY. 6.

1845.

8 & 9 Vict. c. 20, ss. 50, 51—*Railways Clauses* - - - - - - 739
See BRIDGE.

—— —— s. 78 - - - - - - 402
See RAILWAY. 3.

1847.

10 & 11 Vict. c. 17, ss. 6, 12—*Waterworks Clauses* - - - - - 205
See WATERWORKS.

—— —— s. 43 - - - - - - 285
See LONDON, 3.

STATUTES—*continued.*

1848.

11 & 12 Vict. c. 43, s. 5—*Summary Jurisdiction* - - - - - - - 40
See JUSTICES.

1853.

16 & 17 Vict. c. lxvi., s. 79—*East London Waterworks* - - - - - - 285
See LONDON. 3.

1861.

24 & 25 Vict. c. 100, s. 57—*Offences against the Person* - - - - - 383
See CRIMINAL LAW. 1.

1863.

26 & 27 Vict. c. 65, ss. 16, 25—*Volunteers—Regulations* - - - - 709
See ARMY AND NAVY.

1867.

30 & 31 Vict. c. 102, s. 3, sub-s. 2; s. 4—*Representation of the People* - 126
See PARLIAMENT. 1.

1870.

33 & 34 Vict. c. 28, ss. 4, 10—*Solicitors* 155
See BANKRUPTCY. 6.

1872.

35 & 36 Vict. c. 93, s. 39—*Pawnbrokers* - 108
See PAWNBROKER.

1873.

36 & 37 Vict. c. 48, s. 8—*Regulation of Railways* - - - - - - - 356
See RAILWAY. 1.

1875.

38 & 39 Vict. c. 55, ss. 4, 41—*Public Health* 182
See SEWERS.

—— —— s. 149 - - - - - - 78
See HIGHWAY.

—— —— s. 211, sub-s. 1 (*b*) - - - 568
See RATES. 6.

—— —— s. 308 - - - - - - 14
See COMPENSATION.

38 & 39 Vict. c. 63, s. 6—*Sale of Food and Drugs* - - - - - - 278
See ADULTERATION.

38 & 39 Vict. c. 90, s. 10—*Employers and Workmen* - - - - - 916
See EMPLOYER AND WORKMAN. 5.

1876.

39 & 40 Vict. c. 75, ss. 4, 6, 13—*Rivers Pollution Prevention* - - - - - 431
See RIVER.

1878.

41 & 42 Vict. c. 26, s. 5; s. 28, sub-s. 10, 11—*Parliamentary and Municipal Registration* - - - - - - 126
See PARLIAMENT. 1.

—— —— s. 38 - - - - - - 139
See PARLIAMENT. 2.

41 & 42 Vict. c. 77, ss. 10, 27—*Highways and Locomotives* - - - - - 78
See HIGHWAY.

STATUTES—*continued.*

1879.

42 & 43 Vict. c. 30, s. 6—*Sale of Food and Drugs* - - - - - - 278
See ADULTERATION.

42 & 43 Vict. c. 49, s. 33—*Summary Jurisdiction* - - - - - 910
See LONDON. 2.

1880.

43 & 44 Vict. c. 42, s. 1, sub-s. 1 ; s. 2, sub-s. 1—*Employers' Liability* - - 649
See EMPLOYER AND WORKMAN. 3.

—— —— s. 8 - - - - - - 916
See EMPLOYER AND WORKMAN. 5.

1881.

44 & 45 Vict. c. 69, s. 9—*Fugitive Offenders*
See JURISDICTION. 696

1882.

45 & 46 Vict. c. 61, s. 20—*Bills of Exchange*
See PROMISSORY NOTE. 794

1883.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*g*)—*Bankruptcy* - - - - - - 478
See BANKRUPTCY. 1.

—— —— s. 37, sub-ss. 3, 8 ; s. 44, sub-s. 2 (iii). - - - - - - - 397
See BANKRUPTCY. 5.

—— —— Sched. II., r. 22 - - - 155
See BANKRUPTCY. 6.

1884.

48 Vict. c. 3, s. 3—*Representation of the People*
See PARLIAMENT. 2. 139

1885.

48 & 49 Vict. c. 75, s. 2—*Prevention of Crimes*
See POLICE. 59

1888.

51 & 52 Vict. c. 21—*Distress* - - - 690
See DISTRESS.

51 & 52 Vict. c. 43, s. 118—*County Courts* 393
See COUNTY COURT. 1.

1889.

52 & 53 Vict. c. 45, ss. 1, 2—*Factors* - 510
See FACTOR.

—— —— s. 2, sub-s. 1 - - - - 519
See SALE OF GOODS. 2.

52 & 53 Vict. c. 49, s. 12—*Arbitration* - 478
See BANKRUPTCY. 1.

1890.

53 & 54 Vict. c. 45, s. 23—*Police* - - 456
See RATES. 2

53 & 54 Vict. c. 59, s. 19—*Public Health* 182
See SEWERS.

53 & 54 Vict .c. 66, s. 3—*Metropolis Management*
See LONDON. 1. 881

1891.

54 & 55 Vict. c. 11, s. 2—*Electoral Disabilities Removal* - - - - - - 139
See PARLIAMENT. 2.

STATUTES—*continued.*

54 & 55 Vict. c. 39, ss. 33, 82, 122—*Stamps* 246
See REVENUE. 5.

—— —— s. 101 ; Sched. I. - - - 462
See REVENUE. 6.

54 & 55 Vict. c. 76, s. 33, sub-s. 2—*Public Health, London* - - - - 910
See LONDON. 2.

1892.

55 & 56 Vict. c. 57, s. 13—*Private Street Works*
See STREETS. 445

1893.

56 & 57 Vict. c. 61, ss. 1, 2—*Public Authorities Protection* - - - - - 393
See COUNTY COURT. 1.

1894.

57 & 58 Vict. c. 30, s. 5, sub-s. 3—*Finance* 163
See REVENUE. 1.

—— —— s. 7, sub-s. 6 - - - - 331
See REVENUE. 2.

57 & 58 Vict. c. 60, s. 85—*Merchant Shipping*
See SHIPPING. 13. 604

—— —— s. 225, sub-s. 1 (*c*) ; s. 483 - 834
See SHIPPING. 11.

1895.

58 & 59 Vict. c. 11, s. 1—*Lands Clauses—Taxation of Costs* - - - - - 51
See RAILWAY. 2.

1896.

59 & 60 Vict. c. 28, ss. 14, 15, sub-s. 1—*Finance*
See REVENUE. 1. 163

59 & 60 Vict. c. 48, ss. 12, 13—*Light Railways*
See RAILWAY. 2. 51

1897.

60 & 61 Vict. c. 37, s. 1, sub-s. 1 ; s. 7 ; First Schedule, s. 1 (*a*)—*Workmen's Compensation* - - - - - - 219
See EMPLOYER AND WORKMAN. 2.

—— —— s. 7, sub-s. 2 - - - - 531
See EMPLOYER AND WORKMAN. 4.

1898.

61 & 62 Vict. c. 44, s. 5 ; Sched. II.—*Merchant Shipping—Mercantile Marine Fund* 604
See SHIPPING. 13.

1899.

62 & 63 Vict. c. 37, s. 1—*Poor Law* - - 68
See POOR LAW. 2.

1900.

63 & 64 Vict. c. 15, s. 3, sub-s. 4 (i.)—*Burial* 416
See BURIAL.

1903.

3 Edw. 7, c. 36, s. 1—*Motor Car* - - 40
See JUSTICES.

1904.

4 Edw. 7, c. 23, s. 3—*Licensing* - - 47
See LICENSING ACTS. 1.

—— —— s. 3, sub-ss. 1, 2 - - - - 561
See LICENSING ACTS. 2.

STATUTES —*continued.*
4 Edw. 7, c. 23, Sched. I. - - - - - **298**
See LICENSING ACTS. 3.

STATUTORY POWERS — Damage caused by exercise of - - - - - - **14**
See COMPENSATION.

STEVEDORE—Compensation—Injury—Unloading ship—Defect in ship's tackle - **649**
See EMPLOYER AND WORKMAN. 3.

STOCKBROKER—Transfer in books of Bank of England—Personation of holder—Effect of transfer — Estoppel — Liability of stockbroker to indemnify bank - **889**
See INDIA STOCK.

STREAM—Watercourse—Pumping operations—Causing water to percolate out of stream —Cause of action - - - - - **588**
See WATER.

STREETS—*Private Street Works—Apportioned Expenses—Charge on Premises—Sale—Action—Private Street Works*, 1892 (55 & 56 *Vict. c.* 57), *s.* 13.

An action will lie at the suit of an urban authority for a declaration that the plaintiffs are entitled under s. 13 of the Private Street Works Act, 1892, to a charge on premises for the apportioned expenses incurred by the plaintiffs in executing works under the Act, and payable by the defendant in respect of the premises, and for an order that the premises may be sold and for the appointment of a receiver. WEST HAM CORPORATION *v.* SHARP - - **Div. Ct. 445**

STRIKE — Charterparty — Demurrage — Strike preventing or delaying discharge - **626**
See SHIPPING. 2.

STRIKING OUT—Defence—Abuse of process of the Court - - - - - - **860**
See PRACTICE. 8.

SUBSIDENCE—Highway—Subsidence caused by mining operations—Measure of damages
See HIGHWAY. **78**

"SUCCESSOR"—Pawnbroker—Licence — Certificate - - - - - - - **108**
See PAWNBROKER.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUNDAY — Ship — Demurrage — Sundays and holidays excepted—Work done on Sundays and holidays—Shifting from port to port - - **783**, **787**, n., **788**, n.
See SHIPPING. 5—7.

SUPPORT—Loss of—Waterworks—Compensation - - - - - - - **205**
See WATERWORKS.

TAXATION OF COSTS.
See under COSTS.

TAXES.
See under RATES.
REVENUE.

TENANT—Landlord and
See under LANDLORD AND TENANT.

THEATRE—Actress employed at—Negligence of fellow employee — Construction of contract - - - - - - **544**
See EMPLOYER AND WORKMAN. 1.

THIRD PARTY — Bankruptcy—Composition—Dissentient creditors — Payment by third person of assenting creditors—Ignorance of law - - - - **875**
See BANKRUPTCY. 2.

—— Bankruptcy — Payment of premiums by third party—Mortgage of life policy—Repayment of premiums to volunteer out of policy moneys—Duty of trustee
See BANKRUPTCY. 4. **865**

—— Contract—Consideration—Breach of duty to take care—Intervening criminal act of third party causing loss - - **483**
See CONTRACT.

TIME—Appeal—Mistake as to effect of rule—Discretion of Court - - - - **1**
See PRACTICE. 2.

TONNAGE — Light dues — Deck cargo — Coal carried on deck for use on foreign voyage - - - - - - **604**
See SHIPPING. 13.

TORT—Joinder of causes of action—Action of tort—Allegation of joint tort—Costs
See PRACTICE. 5. **246**

TRADE — "Mercantile agent"—Authority to pledge, Extent of—Custom of particular trade - - - - - - - - **510**
See FACTOR.

TRADE UNION—*Raising of Funds for Purposes within Objects of Union—Rules of Union—Absence of provision in Rules for levying Contributions—Injunction to restrain Levy—Jurisdiction of Court.*

One of the objects of a trade union as defined by its rules was "to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament." The rules, however, did not provide any machinery for making a levy upon the members of the union for the purposes of the said funds, nor did they indicate the persons by whom such levy was to be made. A resolution in favour of a general contribution by the members for that purpose having been passed by a large majority of the union, the officials of the union proceeded to levy the contribution. A member of the union who objected to the contribution sought to obtain an injunction restraining the union and its officials from making the levy, upon the ground that in the absence of provision in the rules for making it the levy was illegal;—

Held, that as the provision of a Parliamentary representation fund was within the scope of the association, and as the majority of the members were in favour of it the Court would not interfere with the levy of contributions to that fund merely because the rules did not expressly provide the necessary machinery for making it. STEELE *v.* SOUTH WALES MINERS' FEDERATION - - - - **Div. Ct. 361**

TRAMWAY—Land "used only as a railway constructed under any Act of Parliament"—Tramroad - - - - - 568
See RATES. 6.

TRANSFER—Bank of England—Personation of holder—Identification of transferor by stockbroker—Liability - - 889
See INDIA STOCK.

TREASURY NOTE—Of foreign Government—Stamp—"Promissory note" - 246
See REVENUE. 5.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

UNDERWRITERS — Ship — Mortgage—Salvage loss—Right of underwriters to pay without authority of assured - - 116
See SHIPPING. 10.

UNDISCHARGED BANKRUPT.
See under BANKRUPTCY.

UNION—Trade union.
See under TRADE UNION.

VOLUNTEERS.
See under ARMY AND NAVY.

WAGERING—Gaming and
See under GAMING.

WAGES — Seaman — Refusal to proceed to belligerent port—Right to wages - 670
See SHIPPING. 12.

—— Ship—Seaman—Contract of service—Contraband of war—Refusal to proceed—Offence against discipline—Discharge of seaman - - - - - 834
See SHIPPING. 11.

WAREHOUSE—Rates—Intention to occupy 192
See RATES. 3.

WARRANTY—Harbour Commissioners—Advertisement of depth of water on dock sill Warranty of accessibility - - 310
See HARBOUR.

WATCH—Assay — Hall mark — Watch-cases—Foreign watches - - - - 95
See PLATE.

WATER—*Watercourse—Pumping Operations—Causing Water to Percolate out of Stream—Cause of Action.*

The defendants were the owners of a well and pumping station situate at a distance of about twenty yards from a natural stream. This well was for seventy-six feet of its depth from the top lined with steel cylinders, so that no water from the adjacent soil could obtain access to the well except at a greater depth than seventy-six feet. The plaintiff was a riparian owner lower down the stream. The effect of the defendants' pumping from the well was that the general level of the water in the soil in the neighbourhood of the well was lowered to the extent of about twelve inches, with the result that the soil became dry, and a portion of the water flowing down the stream leaked out through the bed and side of the stream, so that the volume of the water in it was substantially diminished by the time it reached the plaintiff's land. None of the water, however, which so

WATER—*continued.*

escaped from the stream in consequence of the defendants' pumping found its way into the defendants' well:—

Held, that as the defendants did not appropriate any of the water of the stream by pumping it up through their pipes, but merely caused it to sink a short distance into the ground by reason of their withdrawing the support of the lower subterranean water, the damage to the stream gave no cause of action.

Grand Junction Canal Co. v. *Shugar*, (1871) L. R. 6 Ch. 483, distinguished. ENGLISH *v.* METROPOLITAN WATER BOARD
Lord Alverstone C.J. 588

WATERCOURSE - - - - - - 656
See under WATER.

WATERWORKS—*Injurious Affection of Land—Loss of Support—Authorized Working—Construction as distinguished from User of Works—Compensation—Construction of Statutes—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12.

Sects. 6 and 12 of the Waterworks Clauses Act, 1847, are, notwithstanding the heading of the group of sections to which they belong, to be construed as providing for compensation to landowners in respect of the injurious affection of their lands by the taking of water found in and under the lands taken for the construction of waterworks, for the purposes of the waterworks after the completion of the structural works.

General words in the heading of a group of sections cannot be construed as limiting the effect of plain words in a section contained in that group.

So *held*, affirming judgment of Bray J., [1906] 1 K. B. 605.

Hammersmith and City Ry. Co. v. *Brand*, (1869) L. R. 4 H. L. 171, distinguished. FLETCHER *v.* BIRKENHEAD CORPORATION
C. A. 205

—— Supply of water by meter—"Premises"—Land used for building operations 285
See LONDON. 3.

WORDS—"Debenture" - - - - 246
See REVENUE. 5.

—— "single private Drain" - - - 182
See SEWERS.

—— "Event" - - - - - - 656
See PRACTICE. 4.

—— "Hereditament" - - - - 490
See REVENUE. 4.

—— "Keeping possession" - - - 456
See RATES. 2.

—— "Lodger" - - - - - - 126
See PARLIAMENT. 1.

—— "Marketable security" - - - 246
See REVENUE. 5.

—— "capable of actual Occupation" - 490
See REVENUE. 4.

—— "inhabitant Occupier" - - - 126
See PARLIAMENT. 1.

WORDS—*continued.*
—— "Mercantile agent" - - - 510
See FACTOR.
See SALE OF GOODS. 2 - - 519
—— "Payable" - - - - - - 416
See BURIAL.
—— "Payment" - - - - - 155
See BANKRUPTCY. 6.
—— "Police trap" - - - - - 59
See POLICE.
—— "Premises" - - - - - 285
See LONDON. 3.
—— "Promissory note" - - - 246
See REVENUE. 5.
—— "Receipt" - - - - - 462
See REVENUE. 6.
—— "Rent payable" - - - - 47
See LICENSING ACTS. 1.
WORDS—*continued.*
—— "Successor" - - - - - 108
See PAWNBROKER.
—— "Tramroad" - - - - - 568
See RATES. 6.
—— "Tramway" - - - - - 568
See RATES. 6.
—— "Used" - - - - - - 416
See BURIAL.
—— "Workman" - - - - - 531
See EMPLOYER AND WORKMAN. 4.
WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.
WRIT—Service out of jurisdiction—Libel in newspaper—Injunction—Judicial discretion - - - - - - 853
See PRACTICE. 7.

BIRL. LONDON. UNIV.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

UL - 5 DEC 1975